SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 48

TENNESSEE PUBLISHING COMPANY,
PETITIONER,

vs.

AMERICAN NATIONAL BANK, C. O. CARPENTER,
RECEIVER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., SEPT. 28, 1936.

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In The

United States District Court

For The Middle District of Tennessee,
Nashville Division

IN RE: TENNESSEE PUBLISHING CO., Debtor
Appellant

COURT CAPTION, MARCH TERM, 1935

Being the second Monday of March, 1935, be it remembered that at a District Court of the United States begun and held for the Nashville Division of the Middle District of Tennessee at the Federal Court Room in the City of Nashville, Tennessee, within said District, and the Sixth Circuit on the second Monday, it being the 11th day of March, 1935.

Court met pursuant to adjournment, presiding the Honorable John J. Gore, United States District Judge for the Middle District of Tennessee, when the following proceedings were had, to wit:

FILATION ORDER

(Filed June 6, 1935)

This matter came on to be heard before the Honorable John J. Gore, Judge, upon the filing of a petition by the Tennessee Publishing Company Under Section 77-B of the Bankruptcy Act, and it appearing, and the Judge being satisfied, that such petiton complies with Section 77-B of the Bankruptcy Act, being Title II, Section 207, U.S.C.A. and has been filed in good faith, it is ordered, adjudged and decreed, that said petition is hereby approved as properly filed under Section 77-B of the Bankruptcy Act.

It further appearing that the property, business and affairs of the petitioner, the debtor corporation, are now in the possession and control of Honorable L. J. Pardue, as Receiver, in the case of C. O. Carpenter, Receiver of the Holston Union Bank, vs. Tennessee Publishing Company, defendant, in Equity 546, now pending in this court, it is ordered, adjudged and decreed that the said L. J. Pardue, is ordered to keep, take and retain said property business and affairs of the petitioner, subject to the further orders of this court in the premises.

It is further ordered, adjudged and decreed that the hearing of claims filed in the aforementioned receivership suit and the exceptions filed, thereto, be proceeded with to the end and purpose that the various claims of this petitioner will be passed on by this Court, subject however, to such further orders as this Court may enter in the premises.

It is further ordered, adjudged and decreed that a rule forthwith issue against all parties to the aforesaid Receivership case, and to all creditors and stockholders in the Tennessean Publishing Company to appear and show cause, if any, as to whether or not the aforesaid petition of the Tennessee Publishing Company should be dismissed, at a hearing before the Judge of this court at the Federal Court Room, in Nashville, at 9:00 a.m. on July 6, 1935, and L. J. Pardue, Esq., in the aforesaid Receivership case as the party in possession of the business, property and effects of the alleged debtor is ordered to notify all the said parties, creditors, stockholders of the issuance of said rule and said hearing in the manner and form of a published notice thereof in the morning Nashville Tennessean, said insertion of published notice to appear at a time not less than two weeks prior to July 6, 1935, and to be gen-

erally addressed to such parties, creditors and stockholders as aforesaid.

Approved this the 6th day of June, 1935.

GORE, Judge.

O. K. as to form.

WHITE & HOWARD,
Attorneys for "Debtor" Tennessee Publishing Co.

SEAY, STOCKELL & EDWARDS,
For L. J. Pardue, Receiver.

BASS, BERRY & SIMS,
For L. J. Pardue, Receiver.

W. E. NORVELL, Jr.,
For Commerce Union Bank et al.

ORIGINAL PETITION FOR REORGANIZATION

TO THE HONORABLE JOHN J. GORE, JUDGE
OF THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE:
(Filed June 6, 1935)

The petition of Tennessee Publishing Company, a corporation (hereinafter referred to as the Debtor), under Section 77B of an act entitled "An Act to establish a uniform System of Bankruptcy throughout the United States" approved July 1st, 1898, and acts amendatory thereof and supplementary thereto (hereinafter referred to as the Bankruptcy Act) respectfully represents:

1.

The Debtor is a corporation organized and existing under the laws of the State of Tennessee and is a citizen and resi-

dent of said State, and is not a municipal, railroad, insurance, or banking corporation, nor a building and loan association, and is such a corporation that can become a bankrupt under Section 4 of the Bankruptcy Act of 1898 and Section 22, Chapter 3, Title II or the United States Code.

2.

During the six months' period immediately preceding the filing of this petition and for a number of years prior thereto, the Debtor has had, and now has, its principal place of business and its principal assets (being substantially all of its assets) in the City of Nashivlle, County of Davidson, State of Tennessee, in the territory and jurisdiction of the United States District Court for the Middle District of Tennessee; such principal place of business at present and for more than six months last passed being located at 222 Fourth Avenue, North, Nashville, Davdison County, Tennessee.

3.

The Debtor is engaged in the business of operating a newspaper and a printing establishment and now publishes and has published for a number of years a morning and evening daily paper of wide and extensive circulation in Nashville and the territory surrounding Nashville known as the Nashville Tennessean.

4.

On or about the 3rd day of March, 1933, a bill of complaint in equity entitled C. O. Carpenter, Receiver, vs. Tennessee Publishing Company, defendant, in Equity, No. 546, was filed in the United States District Court for the Middle District of Tennessee, and on or about the 3rd day of March, 1933, an order was made and entered in said cause appointing Lit Pardue Receiver of the Debtor and all of its business assets and property. Such equity receivership is now pending in said United States District Court for the Middle District of Tennessee.

5

The principal part of the assets of the debtor consists of its printing presses, stock of supplies, and accounts receivable, and more especially of the good-will and value attached to its circulation. A full and detailed description of said assets has been filed in this Honorable Court in the cause of C. O.

Carpenter, Receiver, vs. Tennessee Publishing Company, supra, and for a full description of the same reference is hereto made. Substantially all of the assets of the Debtor are subject to a certain first mortgage on the property of the Debtor in the sum of $750,000.00. There are certain other assets of the Debtor, the exact amount and character of which would have to be determined by order of this Honorable Court, which might not pass under said mortgage and deed of trust. A list of the machinery, equipment and physical properties of said debtor is hereto attached as Exhibit No. 1, but is not to be copied.

6.

A brief description of the liabilities of the Debtor is:

(a) The $750,000.00 of first mortgage bonds outstanding, which said bonds have several years' accrued interest coupons attached hereto; and

(b) Open accounts in the approximate sum of $750,000.00, which said open accounts are wholly unsecured and claim for a number of which have been filed in the Receiver's cause in this Court.

An itemized list of the liabilities of the debtor can be found in the reports of the Special Master on file in the case of C. O. Carpenter, Receiver vs. Tennessee Publishing Company, now pending in this Court to which reference is hereby made.

7.

The authorized capital stock of the Debtor consists of 3,000 shares of the par value of $100.00 each of preferred capital stock, and 3,000 shares of the par value of $100.00 each of common capital stock. The entire amount of said authorized capital stock is issued and outstanding. The stock books are in the hands of the Receiver and/or his attorneys. The Debtor would show that of the total amount of the common capital stock outstanding 2995 shares belonged to the president of the corporation, Edward W. Carmack, same being all of the common capital stock of the corporation except five shares.

8.

The Debtor would show that default has been made in payment of said $750,000.00 of first mortgage bonds outstanding against its property and that the Receiver has not paid the interest on said bonds, and that it appears a sale of the property of the Debtor may be ordered in said receivership pro-

ceedings at an early date. The Debtor would show that it believes, and has sound basis for said belief, that a sale of the property of the Debtor at the present time and under present conditions could be made only at a great sacrifice and would be to the great injury and detriment of all classes of creditors and to the stockholders of the Debtor and would mean the corporate death of the Debtor.

9.

The Debtor is unable to meet its debts as they mature and the Debtor requires relief under Section 77B of the Bankruptcy Act by reason of the fact that the assets formerly held by the Debtor and now in the possession of its Receiver are of substantial value and that such assets, when administered as a going concern with the good-will connected therewith, have an earning power which should be preserved by proceedings for reorganization of the Debtor under Section 77B of the Bankruptcy Act. Such reorganization would be for the benefit of the creditors and other interested parties, whereas, if said assets are liquidated, their value will be greatly diminished, all of which is particularly true in the case of a newspaper, which is the business operated by this Debtor.

10.

The Debtor would show that, as above set out, the assets belonging to Debtor are now in the hands of a Receiver who is operating said plant and is continuing to publish the daily Tennessean under orders of this Court in another cause, and the Debtor has been advised and believes that an application has been made in said cause by one or more of the secured creditors asking that the assets and properties belonging to the debtor be sold in said cause, and that it is probable that at the instance of such creditor or creditors this Court might grant said petition and direct the sale of said properties in the imediate future.

The Debtor would show that its President, Edward W. Carmack, is at the present time in negotiation with numerous of the creditors of both classes; that he owns a portion of the preferred stock and substantially all of the common stock of the Tennessee Publishing Company, and is therefore vitally interested in seeing the debtor work out a plan whereby a reorganization of the corporation may be effected, and whereby not only the secured creditors, but also the common creditors, may realize substantial amounts upon their indebtedness. The Debtor believes that if the properties and assets of the corporation were sold in the immediate future in the Receiver-

ship cause it is highly probable that the properties and assets would be sold at a great sacrifice, and that the unsecured creditors would not realize anything for their debts, and probably a small group of the bondholders would obtain possession of the properties by bidding in same at a price much lower than the present value thereof.

The Debtor would further show that the President, Edward W. Carmack, has reasonable assurance of outside financial support wherein and whereby, if the Debtor is granted the relief under Section 77B of the Bankruptcy Act, it will be able to effect a reorganization thereunder, to the great benefit of its creditors and other interested parties.

The Debtor is adised and believes that this Court, acting under the broad authority and power granted by Section 77B of the Bankruptcy Act, may consider and, if deemed advisable, approve reorganization plans of the Debtor corporation, which would be advantageous to all classes of creditors and to the stockholders of the Debtor, and which plan of reorganization would not be possible under the equity receivership case.

The Debtor is further advised and believes that the rights and benefits made available to it by said Section 77B of the Bankruptcy Act constitute additional and different relief, which this Debtor is now entitled to seek, and that upon the facts set out herein this Court will accord to the Debtor the benefits of such Act, and will permit it to seek and take advantage thereof.

11.

The filing by the Debtor of this petition has been duly authorized by resolution of the Board of Directors of the Debtor, adopted at a meeting thereof duly held on the 5th day of June, 1935.

12.

WHEREFORE, the Debtor prays that this Honorable Court shall enter an order approving this petition as properly filed under Section 77B of Chapter VIII of the Acts of Congress relating to bankruptcy and that the Debtor may be granted such other and further relief as to this Court may seem just and equitable.

TENNESSEE PUBLISHING COMPANY,
By EDWARD W. CARMACK, President.

WHITE & HOWARD,
Attorneys.

UNITED STATES OF AMERICA,
MIDDLE DISTRICT OF TENNESSEE,
STATE OF TENNESSEE,
COUNTY OF DAVIDSON.

Edward W. Carmack, being duly sworn, makes oath that he is the president of the petitioning Debtor mentioned and described in the foregoing petition and he makes solemn oath that the statements contained therein are true according to the best of his knowledge, information, and belief.

EDWARD W. CARMACK.

Sworn to and subscribed before me, Grace Dawson, a Notary Public in and for said State and County aforesaid at office at Nashville, Tennessee, this 5th day of June, 1935.

(SEAL)

GRACE DAWSON,
Notary Public.
My Commission expires Oct. 15/35.

Exhibit No. 1 To Original Petition

PRESSES:

One (1) 64 page Octuple Newspaper Web Perfecting printing press serial No. o.12591, with one (1) Hoe High Speed Internal Gear Double Former Folder with transverse collecting arrangement, and two (2) half page deliverers.

One (1) Hoe 4 deck 32 page single width straight line press No. 929 with folder.

STEREOTYPE:

One five ton metal pot with agitator and motor
One one ton " " " " " "
One Hoe 14½ inch diameter curved plate.
Finishing, cooling and drying machine, serial No. 0.14022, equipped with motor suitable for 220 volts 3 phase, 60 cycle, alternating current.
One Hoe 14½" diameter curved plate, finishing, cooling and drying machine No. 70, equipped with motor suitable for 220 volts 3 phase, 60 cycle, alternating current.
One Hoe 14½" Due cooled Equipoise Curved Casting Mould, Serial No. 2081 complete with side and head gauges and metal pump.
One curve Roaster. One Hoe 14½" diameter Equipoise Curved Casting Mould with gauges.
One curve Router, with metal pump.
Two Finishing Blocks.
One Matrix Trimmer
One Tail Cutter and Shaver
One Saw and Trimmer
One Jig Saw and Drill
One flat Shaver
One 7 Column Casting Box, flat
One Air Compressor and two storage tanks.
One Matrix Moulding Machine No. 634.
One Coke Boiler.
One Gas boiler.
One two pocket drying table.
One wood Humidor.
One flat Roaster

COMPOSING:

Thirteen Mergenthaler Linotype Machines.

One Model	K.	Serial Number	1497,	2	magazines
" "	K.	" "	1503,	2	magazines
" "	K.	" "	1600	"	"
" "	K.	" "	1506	"	"
" "	K.	" "	1504	"	"
" "	K.	" "	1502	"	"
" "	K.	" "	1501	"	"
" "	K.	" "	1499	"	"
One Model	9	Serial Number	19578	4	Magazines
" "	9	" "	20376	4	"
" "	9	" "	19581	4	"
" "	8	" "	41034	3	"
" "	8	" "	41033	3	"

One Monotype Type Caster Series S 8293

Exhibit No. 1 To Original Petition

One Monotype Material Caster No. 8212
One Miller Metal Saw No. 1283
One Miller Metal Saw No. U5399
One Proof Press 3-57.

ENGRAVING:

One Royal Router
One Axel Holmtrom Bath Mach. Series 1925.
One Morgans Proof Press
One Ostrander Seymour Saw and Trimmer
One Engraving Printing Frame
One Levy Process Camera No. A2952, with Cooke lens No. 122737.
One Cooke prism.
One Levy 55 line screen
One economic 65 line screen
One Ostrander Seymour burning in furnace.
One Pyro silver bath.

GENERAL:

One Automatic Color Job Press
One Regular Job Press.

CIRCULATION:

One Rapid Addressing Machine, Model "2", Serial 2091, Style K.
One Rapid Addressing Co. Addressograph Model 1, Serial 2078, Style D.

All other machinery, equipment, office furniture, typewriters, automobiles, trucks, mailing machines, files, records, books, library, rights, franchises, easements, good will, subscription lists, contracts for advertising, press franchises and other personal property used in publication of Nashville Tennessean, all of aforesaid tangible property, except motor vehicles being located at 222 4th Ave. N., including right, title and interest which the Publishing Co., has in, and to membership in Asso. Press now in name of Luke Lea, Jr., used in publishing of Nashville—Tennessean.

ORDER OF PUBLICATION

(Filed June 21, 1935)

In this cause, it is ordered, adjudged and decreed as follows:—

1. Debtor is granted leave to file its Petition making application to be restored to the possession of its property.

2. The hearing of said Petition and application of debtor to be restored to the possession of its property is set before the Judge of this Court, at the Federal Courtroom, in Cookeville, Tennessee, at 10 o'clock A.M., on July 5, 1935.

3. The Debtor will forthwith cause publication of the notice of said hearing of the application of debtor to have its property restored to its possesion, to be made in the Evening Nashville Tennessean, the first insertion to appear on Saturday, June 22, 1935, and the second insertion, on Saturday of the week following, to-wit: June 29, 1935, said notice to be generally addressed to all parties, creditors, stockholders and persons holding interests and/or claims against debtor and/or its properties and in addition debtor shall, on or before Wednesday, June 26th, 1935, mail in the Post Office at Nashville, Tenn., copies of such notice addressed to creditors and attorneys of record in the cause of C O. Carpenter, Receiver, vs. Tennessee Publishing Co. pending in this court and also to the Stockholders of debtor.

Dated, this 21st day of June, 1935.

JOHN J. GORE, District Judge.

PETITION OF DEBTOR TO BE RESTORED TO POSSESSION

(Filed June 22, 1935)

The PETITION of the TENNESSEE PUBLISHING COMPANY, a corporation, hereinafter referred to as "Debtor", respectfully represents:

Petition Of Debtor To Be Restored To Possession

1. That its Petition under section 77-B of an Act entitled - An Act to establish a Uniform System of Bankruptcy throughout the United States approved July 1, 1898, and Acts amendatory thereof, and subsequently thereto, - was filed herein on June 6, 1935, and was, by decree of the Court, on the same day approved to be filed.

2. Debtor is advised it is necessary for its application, to be restored to possession of its properties, to be filed within thirty (30) days from the date of the approval of its Petition. And that in addition, it is necessary that a hearing upon its said application shall be set, likewise, within thirty (30) days from said date of approval, and that notice of said hearing, by publication for two (2) successive weeks, must be made.

3. Debtor hereby makes application to the Court for the return of its property to its possession, all in conformity with said section 77-B of said Bankruptcy Act and amendatory Acts.

PREMISES CONSIDERED, DEBTOR PRAYS:

That this Honorable Court, by proper Order, cause publication to be made, as required by Section 77-B of the Bankruptcy Act, the Bankruptcy Act of 1898, and Amendatory Acts, to the end that a hearing may be had upon its application to be restored to possession of its properties, and that such hearing be set within thirty (30) days from the date of the approval of the filing of its Petition herein.

Debtor prays that upon said hearing, all of its properties be restored to its possesion, with full authority to continue the operation of said properties, as officer of the Court, and subject at all times to the orders of the Court.

Debtor prays for all such orders and decrees as may be necessary in the premises.

TENNESSEE PUBLISHING COMPANY,

By EDWARD W. CARMACK, President.

Petition Of Debtor To Be Restored To Possession

Order Of Continuance

WHITE & HOWARD,
By Jordan Stokes, Jr.

JORDAN STOKES, Jr.,
Attorneys for Debtor.

UNITED STATES OF AMERICA
MIDDLE DISTRICT OF TENNESSEE

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Edward W. Carmack, being duly sworn, makes oath that he is President of the debtor corporation, and that the statements contained in the foregoing petition are true, acocrding to the best of his knowledge, information and belief.

EDWARD W. CARMACK.

Subscribed and swotn to before me,
This, 21st day of June, 1935.

(SEAL)

ALINE J. SWAIN,
Notary Public.

My Commission Expires Feb. 8, 1938

ORDER OF CONTINUANCE

(Filed June 27, 1935)

This cause came on to be heard on July 5, 1935, before the Honorable John J. Gore, Judge, upon the petition of the Tennessee Publishing Company, the debtor, filed June 21, 1935, asking return of its property to its possession, etc. and thereupon, at the suggestion of the Court, on account of other engagements, etc., it is ordered, adjudged and decreed that the hearing be, and the same hereby is, adjourned until eleven o'clock A. M. Saturday, July 13, 1935, at Monteagle, Tennes-

see, there to be resumed at Chambers at the Assembly Inn, and all of this without prejudice to the rights of any party.

ENTER:

GORE, Judge.

APPROVED AS TO FORM:
JORDAN STOKES, Jr.,
WHITE & HOWARD,
By J. W. Stokes,
Attorneys for Debtor.

SEAY, STOCKELL & EDWARDS,
BASS, BERRY & SIMS,
Attorneys for Lit J. Pardue, Receiver of Tennessee Publishing Company.

W. E. NORVELL, Jr.,
Attorney for Commerce Union Bank, et al.

ORDER OF CONTINUANCE

(Filed June 26, 1935)

In this cause the hearing heretofore set at 9:00 o'clock A. M. on July 6, 1935, upon the order to show cause as to whether or not the petition of Tennessee Publishing Company should be dismissed, for satisfactory reasons is continued and said hearing is set for 11:00 o'clock A. M. on July 13, 1935, at Monteagle, Tennessee.

Aproved, this 26th day of June, 1935.

GORE, Judge.

LAURENCE B. HOWARD,
Attorneys for Debtor.

BASS, BERRY & SIMS,
SEAY, STOCKELL & EDWARDS,
Attorneys for L. J. Pardue, Recvr.

W. E. NORVELL, Jr.,
Attorney for Commerce Union Bank.

ORDER ALLOWING DEBTOR ACCESS TO ITS RECORDS

(Filed July 5, 1935)

In this cause, upon application of debtor, it is ordered, adjudged and decreed, as follows:

1. Debtor be given access to all of the books, records, payrolls, documents, and any and all data and information with reference to the affairs of debtor and L. J. Pardue, Receiver, both prior to the receivership and subsequent thereto, that are in the possession of the Receiver, or under his dominion and control, provided any examination of such record shall be in the place of business of the Receiver.

That the Receiver is ordered and directed to give access to, and the right of inspection of, all of said records, documents, payrolls and information in his possession, to the debtor, its officers, attorneys and agents; provided only, that debtor shall not unduly inconvenience and interfere with the orderly operation of the business being conducted by the Receiver, and that such inspection and examination shall be conducted at reasonable hours.

2. Debtor's officers shall have the right to make stock transfers on the stock books leaving, however, the certificates from which transfers are made and taking the certificates issued therefor.

3. It is further ordered that the Receiver shall not allow at any time any property, record, paper or document to be taken or removed out of the Receiver's custody or control, but any party entitled may examine the same at the office or place of business of the Receiver.

Dated this, the 5th day of July, 1935.

GORE, District Judge.

O. K. for Entry:

WHITE & HOWARD,
JORDAN STOKES, Jr.,
Solicitors for Debtor.

ED T. SEAY,
For L. J. Pardue, Receiver.

ANSWER OF C. O. CARPENTER, RECEIVER OF THE HOLSTON-UNION NATIONAL BANK

(Filed July 10, 1933)

C. O. Carpenter, Receiver of the Holston-Union National Bank, of Knoxville, Tennessee, by appointment of the Comptroller of the Currency of the United States, says that Tennessee Publishing Company is indebted to him in the amount of $67,723.21, and that before the filing of the bill against the Tennessee Publishing Company referred to in the petition filed herein there was pledged to secure said indebtedness certain bonds, among which were $28,000 par value of the First Mortgage bonds of Tennessee Publishing Company, all of which were greatly insufficient to pay the said indebtedness, and that Tennessee Publishing Company is further indebted to him in the principal amount of $37,500, which is not secured but is a general claim against Tennessee Publishing Company; and said C. O. Carpenter, Receiver of the Holston-Union National Bank, considering that he has been made a defendant to the petition filed herein by (a) the averments thereof, (b) the order heretofore entered herein directing him and all other creditors and stockholders of the Tennessee Publishing Company to appear and show cause, if any there be, why said petition should be dismissed; and (c) by the notice heretofore published in accordance with the provisions of said order, for answer to said petition says:-

I

The filing of said petition was not duly authorized by the Tennessee Publishing Company.

II

Said petition is not filed by the Tennessee Publishing Company acting through a duly authorized officer thereof. It is denied that Edward W. Carmack is the President of the Tennessee Publishing Company.

III

It is shown to the Court that the Act of Congress under which said petition is filed provides that the petition filed herein can be approved only by this Honorable Court in the event the Court is satisfied that the petition has been filed in good faith. It is averred that this petition has not been filed in good faith for the reasons that:

(a) There is a trust deed upon all of the property of the debtor, Tennessee Publishing Company, which under the law

can be mortgaged, to secure an issue of bonds in the amount of $750,000, long in default. The general claims against Tennessee Publishing Company, as reported by the Standing Master in the proceeding referred to, aggregate the amount of $391,069.76, the bonded indebtedness amounts to $750,000, and other secured claims total $138,186.55. These facts appear in the record in this case by reference made thereto in said petition. The assets of the debtor which are unencumbered by said trust deed are of an insignificant value as compared with the amount of general claims. There is no possible equity in the mortgaged property for general creditors. The total saleable value of all the property of the defendant will not exceed $300,000. The debtor is without working capital. It owns no building. It leases the building, which is wholly inadequate for the purpose of operating a newspaper therein. The offices of its managers are of necessity located in another building. Its printing presses are in a bad state of repair and are inadequate for the purposes for which they are used. Prior to the filing of the receivership proceeding it annually lost large sums of money and its earnings in the hands of a Receiver indicate that the debtor cannot be reorganized. It accordingly appears that there is no reasonable probability that a reorganization will be effected. In other words, there can be no feasible and practical plan of reorganization presented. Therefore, there is no occasion to invoke the benefits of the Act.

(b) The petitioner does not set forth a plan of reorganization and the clear inference to be drawn from the petition taken in connection with the assets and liabilities of the debtor (which are disclosed in the record in the receivership case to which reference is made in the petition) is that no plan of reorganization will be forthcoming by petitioner.

(c) While it is denied that Edward W. Carmack owns all but five shares of the common stock of the debtor, and that he owns any portion of the preferred stock, it is here averred that even if said individual is the owner of all or any part of said stock, that he acquired it as a part of a scheme to bring about the filing of the petition herein. The acquirement by him of said stock was for the sole purpose, and no other, to attain the filing of said petition.

(d) At the time of the filing of the proceeding, on March 3, 1933, referred to in the petition, of C. O. Carpenter, Receiver, vs. Tennessee Publishing Company, the Tennessee Publishing Company was being operated by Luke Lea and Luke Lea,

Jr. They were not operating it in good faith for the benefit of creditors. Its printing presses and machinery had been allowed to greatly deteriorate in value. In fact, the condition was such that it was dangerous to operate one of the presses. The claims against creditors for advertising to be done in the future had been assigned. It was with difficulty that they were able to get sufficient supply of printing paper to fulfill the needs of the corporation from day to day. The paper was being published to suit the political aims and purposes of the two gentlemen mentioned and without regard to the rights of its creditors. The petition herein was filed not in good faith for the benefit of the creditors of the debtor but to the end that Luke Lea and Luke Lea, Jr., may again get control of the paper and to again operate it to suit their own aims and purposes and without regard for their creditors. The said Edward W. Carmack is but an instrumentality of Luke Lea and Luke Lea, Jr. The stock of Tennessee Publishing Company is utterly worthless. It has no value. If it were acquired by Edward W. Carmack, he paid nothing therefor but is holding it merely as an agent for Luke Lea and Luke Lea, Jr.

(e) The insolvency proceeding of C. O. Carpenter, Receiver, vs. Tennessee Publishing Company has proceeded too far to admit of a reorganization of the debtor.

It is denied that the President, Edward W. Carmack, has reasonable assurance of outside financial support whereby he will be able to effect a reorganization of the debtor. Luke Lea and Luke Lea, Jr., who, through the said Carmack, are attempting to be placed in possession of this property, ran the debts of the Tennessee Publishing Company up to the amount aforesaid of $1,279,256.31, and accordingly the averments in the petition that someone would advance a sum of money which would enable a reorganization of a company in such a desperate plight could not be true, is unworthy of belief and is denied.

IV

There is no possibility of two-thirds in amount of the claims of bondholders accepting any plan of reorganization, for the reason that to do so would merely result in their giving up something which they already have to general creditors.

Respondent prays the Court that a hearing be had in open

Court upon the date heretofore set to try the issues made up by said petition and this answer thereto.

C. O. CARPENTER,
Receiver of the Holston-Union Nationl Bank, of Knoxville, Tennessee.

FOWLER & FOWLER,
Solicitors.

STATE OF TENNESSEE
COUNTY OF KNOX

Personally came C. O. CARPENTER, who being duly sworn, says that he is Receiver of the Holston-Union National Bank, of Knoxville, Tennessee, by appointment of the Comptroller of the Currency of the United States, and that the facts stated in the foregoing answer are true to the best of his knowledge, informaion and belief.

C. O. CARPENTER.

Subscribed and sworn to before me this 8th day of July, 1935.

My commission expires on the 23rd day of April, 1938.

(SEAL)

CLIFTON S. FOSTER,
Notary Public.
July 9, 1935.

HGF:W
Encl.

ANSWER OF AMERICAN NATIONAL BANK, A CREDITOR, AND MOTION TO DISMISS PETITION, ON ORDER TO SHOW CAUSE

(Filed July 12, 1935)

Comes American National Bank of Nashville, a creditor, and in response to the order to show cause heretofore entered on June 6, 1935, says:

I

American National Bank is the lawful owner and holder of

bonds Nos. 326-350; 376-500; 626-660; 666-690, all inclusive, issued by debtor, together with coupons for interest thereon, maturing May 1, 1933, and all semi-annual interest coupons maturing since that date, which bonds aggregate the principal amount of $210,000.00, and the past due interest as of May 1, 1935, being $29,575.00.

Said bonds are a part of the series of bonds issued by debtor November 1, 1928, and secured by a first mortgage deed of trust, recorded in Book 708, page 69, in the Register's Office of Davidson County, Tennessee, the total principal amount of said bonds now outstanding, inclusive of those above mentioned, being $750,000.00, on which the debtor has been in complete default in semi-annual interest coupons since May 1, 1933. The total due and unpaid on said bonds, principal and interest as of July 1, 1935, is $879,375.00. Said first mortgage deed of trust executed to secure the aforesaid bonds covers all of the properties of the debtor of every kind whatsoever, exclusive only of materials, supplies, merchandise consumable in the usual course of business, shares of stock, securities, cash, claims, book accounts or bills or notes receivable. There are no assets of the excluded class, except a small amount of materials consumable in use, such as printing ink and newsprint paper, the cash on hand held by the Receiver, and the accounts and bills receivable.

The remaining bonds in said issue, together with matured and unpaid interest coupons thereon are owned and held as follows:

NAME	PRINCIPAL
W. G. Bush & Company Nashville, Tennessee	$115,000
Canal Bank & Trust Company, New Orleans, La.	250,000
O. H. Ingram, Nashville, Tennessee	60,000
C. O. Carpenter, Reeciver Holston Union National Bank, Knoxville, Tenn.	28,000
Commerce Union Bank, Nashville, Tenn.	64,000
Broadway Discount Corporation, Nashville, Tennessee.	23,000

Because of the various defaults in the payment of interest, defaults in failing to provide sinking fund deposits totaling not less than $100,000.00 by February 28, 1934, and on account of various other defaults, as provided under the terms and provisions of the deed of trust executed by the debtor to secure the said bonds, all of said bonds have become due and

payable, and the total principal amount due thereunder, together with accrued interest, aggregating $879,375.00 constitutes a first and prior lien upon all of the assets of the debtor, excepting only cash on hand, bills and accounts receivable, and merchandise consumable in use.

II

On March 3, 1933, C. O. Carpenter, Receiver of the Holston Union National Bank of Knoxville, Tennessee, filed a bill in equity against the debtor in this court, which bill was duly sworn to and alleged in substance, as follows:

(a) That debtor owed plaintiff approximately $100,000.00, to secure which plaintiff held $28,000.00 of the aforementioned bonds along with certain other collateral, and said indebtedness was past due and unpaid.

(b) That the total liabilities of the debtor, including claims of all classes, was approximately $1,500,000.00, and fair value of the debtor's physical assets was approximately $337,000.00, and that the debtor was hopelessly insolvent.

(c) That the debtor had operated continuously from the year 1929 to the filing of the bill at a tremendous loss, as follows:

1929 Net operating Loss - - - -	$ 18,779.79
1930 Net Operating Loss - - - -	125,977.00
1931 Net Operating Loss - - - -	133,900.34
1932 Net Operating Loss - - - -	83,750.82

(d) That the affairs of the debtor had reached such a critical state that the total gross income from all sources was less than the operating expenses. The debtor was faced with additional monthly deficits and that it was unable to pay the salaries and wages due its employees, and had issued checks to its employees for salaries and wages which the bank had declined to pay because of insufficient funds.

(e) The debtor had no supply of newsprint paper other than that which it purchased daily from a local warehouse, and that the situation was so acute that the debtor would very shortly be unable to purchase the necessary newsprint paper in order to publish its daily morning and afternoon editions; that the debtor was delinquent in the payment of various taxes, and distress warrants had been issued and were in the hands of officers to be levied upon the debtor's assets; that the debtor had permitted its President, Vice President and

General Manager to withdraw large sums of money from its assets, and that the individuals occupying these positions had recently been tried and convicted, and were then sentenced to serve a term in the penitentiary in the State of North Carolina; and that said individuals who were the controlling spirits and owners of the common stock of the debtor had deported from their usual place of residence in Nashville, Davidson County, Tennessee, and had taken up residence in Montgomery County, Tennessee, and had to all practical purposes abandoned the affairs of the debtor corporation, which in the meantime had drifted into a hopeless financial condition with no hope of any financial rehabilitation from any source whatsoever, and its demise was only a matter of a few dys.

(f) That the debtor during this period had permitted its machinery, equipment and presses to become in a bad state of repair, had failed to make the usual replacements required by the normal operations of the business, and was able to print its daily editions only with the greatest of difficulties.

(g) That as result of the foregoing situation and the neglect by the debtor of its corporate affairs, the circulation of the newspapers had dropped from 96,221 to 80,256, or a net loss in circulation over a two year period of approximately 16.00

Respondent here and now avers that each and every one of the foregoing allegations were true in substance and in fact, and because of such facts, all of which were occasioned by the debtor, the Honorable Lit J. Pardue was duly appointed by this court in said equity cause as Receiver on the filing of the bill towit March 3, 1933, and from and after said date the said Lit J. Pardue has had complete control of the operations of the affairs of the debtor, acting under the guidance and instruction of the court.

III

On May 8, 1933, debtor filed an answer to the foregoing bill denying some of the allegations therein, but failed to deny complete and total insolvency, and thereafter on May 18, 1933, the plaintiff in said cause filed a motion to sustain the bill as a general creditors' bill, and thereupon after notice to the debtor and without any objection or protest on its part, on June 3, 1933, the court sustained said bill as a general creditors' bill, judicially declared the debtor to be insolvent, and ordered a reference to Byrd Douglass, Esq., Standing Master, to take proof and report upon the claims and priorities of all creditors whose claims were filed in the cause within the

time provided by the decree, which required such claims to be filed by December 15, 1933. Respondent further shows that claims were filed pursuant to said order by a large number of creditors, aggregating approximately $1,500,000.00, including the claims of the bondholders hereinabove set out, and also the claims of the various unsecured creditors.

Defense was made by the Receiver with respect to a large number of the claims. Thereupon hearings were had by the Standing Master lasting over a period of several months, the testimony on said hearings, not including exhibits, comprising a large volume of several hundred pages. Briefs were prepared by a large number of attorneys representing various claimants and adversary parties, and oral hearings and arguments were had before the Master, as a result of which the Master filed a report on March 20, 1935, passing upon each and every claim filed against the debtor. In said report the Standing Master reported and allowed the claims of the various bondholders as hereinbefore set out, including the cailm of this respondent, and further reported said bonds to be secured under the deed of trust by a first lien against all of the assets of the debtor of every character whatsoever, excepting only the assets expressly excluded under the terms of the deed of trust, being, insofar as material to this controversy, the cash on hand, accounts receivable and personal property consumable in use. No exceptions were filed to the report of the Standing Master with respect to the allowance of the claims of bondholders or the fixing of the lien on the deed of trust to secure said bonds, and the time for filing such exceptions has expired, and the report of the Master, therefore, in legal effect is a final adjudication of the rights and property of the bondholders.

The Master's report allowed one claim as preferred towit: Claim of $8,000.00, asserted by Mrs. Percy Warner, growing out of the alleged assignment of the debtor's advertising contracts with Lebeck Bros. and Castner-Knott Dry Goods Company, both of Nashville, Tennessee. The Receiver duly excepted to the alowance of said claim as a preferred claim. Briefs were filed in support of the exceptions and a reply thereto by claimant. An oral argument has been had and this question is now being considered by the court. Exceptions were filed to other general claims and practically all of said exceptions have been orally argued, briefs filed and are now being considered by the court.

By proper proceedings and on motion of the plaintiff in the foregoing receivership cause, a hearing was ordered and held

on June 6, 1935, for the purpose of acting upon exceptions of the Master's report, and to order a sale of the properties so as to terminate the receivership.

Respondent shows that the debtor had notice of each and every step taken in the equity proceedings, and although the amendment to the Bankruptcy Act, known as Section 77-B, was enacted and became effective on June 7, 1934, the debtor has stood by for an entire year and permitted the equity proceedings to be carried to the point of practically a complete liquidation, the only further step being to order a sale of the properties of the debtor and to fix and satisfy the expenses of the Receivership. Respondent is informed and avers that at no time during the progress of the entire litigation has the debtor manifested the slightest activity with respect to a reorganizaion of the corporate affairs for the manifest reason that upon a fair appraisal of the property covered by the bonds it is well known, and has always been recognized by the debtor, as well as the other parties in interest, that such property will be totally insufficient to cover the principal amount due on the bonds, and that the remaining assets, not covered by the bond mortgage and now held by the Receiver, will be substantially consumed in the payment of the Receiver's obligations to banks and the expenses of the receivership, so that little if any funds will be available for common or unsecured creditors. The inability of the debtor to effect a reorganization under such circumstances is further apparent in view of the fact that it has outstanding $300,000 of preferred stock, and common stock of the par value of $300,000.

Respondent avers that under these circumstances where the receivership was precipitated and caused by the debtor's own gross neglect, defaults and inability to operate its affairs, and where it is now manifest to all of the real parties in interest that by reason of all of the facts herein recited, the assets have been so dissipated and mismanaged by the debtor that they will not be sufficient to pay the principal due on the bonds, and only a small amount if anything will be available for unsecured creditors, and where the debtor has stood by for a year and permitted the corporate affairs to be practically liquidated through an equity receivership, without coming forward with any plan, or any suggestion of a possibility of reorganization, its petition should now be dismissed by this court as not being filed in good faith as required by the Statute.

In this connection respondent avers that if the debtor's petition should now be sustained all of the work and expense

incident to the receivership will be set aside, and it will become necessary for claimants of every character to again be notified to appear and file claims, and this court will be required to hear the testimony with respect to each claim, and to adjudicate such claims denovo, which according to respondent's experience in the equity cause will take a period of approximately one year at a minimum.

Respondent avers that under these circumstances, and under the manifest impossibility of any reorganization, this court should not permit the petition to stand and should dismiss the same peremptorily for lack of good faith.

IV

Respondent further shows that upon the appointment of Lit J. Pardue as Receiver, on March 3, 1933, it was found that the debtor's working capital had been entirely dissipated, and as before stated, employees held the debtor's checks aggregating approximately $14,000.00, payment on which had been refused by the banks, and the debtor had permitted its plant to become in such state of disrepair that it was dangerous for the employees to operate the presses. Because of this situation it was necessary for the Receiver to immediately obtain a line of credit so as to borrow money at the banks, and the Receiver has from time to time borrowed sums of money which were used in connection with the operation of the business, the necessary repairs and replacement of machinery, and in part to take up the bad checks given by the debtor to its employees prior to the receivership. By arduous attention to the affairs of the business the Receiver has been able to surmount many of the difficulties directly due to the wrongful acts and defaults of the debtor, and has improved the circulation of the newspapers, but nevertheless respondent is informed and avers that the receivership during the calendar year 1933 operated at a loss of approximately $10,000.00, or if the accrued interest on the bonds were included, at a loss of $55,323.39. By the most careful attention to the business, as compared with the dereliction, misconduct and defaults of the debtor, respondent is informed and avers that the Receiver was unable to make operating expenses during the calendar year 1934, the net operating result being a loss of approximately $10,000.00, and if interest due bondholders were included, a net loss of $51,107.51.

The Receiver, as of July 3, 1935, owes the bank the sum of $28,328.62, and has on deposit less than $1,000.00. There is no working capital left in the business and the Receiver is

absolutely dependent upon his monthly income to take care of his monthly operating expenses. In addition to these facts, during the months of July, August and September newspaper advertising is always at its lowest ebb, these months being recognized in the business as being the lean months. It is, therefore, manifest that it is highly important that the properties be disposed of at a speedy sale, and unless this is done respondent avers that the value of the assets will be further depreciated, and any further postponement of such sale by entertaining the debtor's petition or otherwise will be greatly detrimental and might be disastrous to the creditors. Certainly it would eliminate any possibility of general or unsecured creditors receiving anything on their claims.

V

Respondent avers that the debtor has no assets of any character, except those in the hands of the Receiver; that it has absolutely no financial responsibility or credit standing, and has no working capital, and that it is well recognized by all parties in interest that the debtor has not the remotest possibility of obtaining any financial assistance of any character whatsoever, nor is there the slightest chance of it ever being able to successfully reorganize its corporate affairs. Your respondent has been actively engaged, in cooperation with other bondholders, in formulating plans to secure a purchaser of the debtor's properties with the hope of salvaging some part of its first mortgage indebtedness held by them, and in this connection your respondent has had the properties valued and appraised by competent experts, and has been in touch with responsible persons interested in acquiring said properties. All of said parties have been unanimously of the opinion that the entire properties were not reasonably worth more than the principal due on the bonds. Your respondent avers that under these facts the debtor could not be acting in good faith in proposing a reorganization, as such reorganization is not reasonably possible, but is in fact absolutely impossible. Added to this situation is the well recognized fact that the plant and equipment of the debtor is so antiquated that there is an immediate necessity for the expenditure of approximately $100,000.00 for the purchase of new presses and other equipment, plus an additional sum sufficient for adequate working capital.

VI

The petition filed by the debtor recites that its President, Edward W. Carmack, is at the present time in negotiation

with numerous of the creditors of both classes, and that he owns a portion of the preferred stock and substantially all of the common stock of the debtor. Respondent denies each and every one of these allegations, and avers that the said Edward W. Carmack at the time of the filing of the petition was not the duly elected President of the debtor, nor did he own a single share of either preferred or common stock in said corporation. Respondent avers that the books and records of the debtor failed to show the said Carmack was the owner of either preferred or common stock, and that practically all of the common stock appears of record to be owned by Col. Luke Lea, and respondent is informed and upon information avers that the said Carmack has no financial or other interest in said stock, and that the same was delivered to him by the said Luke Lea on or before June 5, 1935, the day before the debtor's petition was filed, for the sole purpose of permitting him to file the petition, in order to deprive the bondholders of their right to an immediate sale of the properties. Respondent is advised that no meeting of the stockholders was called or held prior to the filing of the debtor's petition, and that at the time the petition was filed the said Luke Lea was President of the debtor corporation, and not the said Edward W. Carmack. Respondent avers that said petition was filed wholly without any legal authority from the debtor corporation, this precipitate action being taken regardless of the consequences for the sole and single purpose of postponing a sale of the properties without the slightest hope or expectation of ever being able to offer any acceptable plan of reorganization.

In this connection respondent shows that any such proposed plan of reorganization would either have to pay and satisfy the bondholders' claims in full, or obtain the consent of two-thirds of such bondholders as well as two-thirds of the unsecured creditors. Further the consent of the proper number of preferred stockholders would have to be obtained to a reorganization plan. Respondent avers that the debtor well knows that under these circumstances it will never be able to present any feasible plan that will be approved by the bondholders, the unsecured creditors and preferred stockholders, as required by Section 77-B of the Bankruptcy Act, and that for this additional reason said petition was not filed in good faith, and should be dismissed.

VII

Respondent denies that either the debtor or the said Edward W. Carmack has reasonable assurance of outside finan-

cial support, and denies that if relief under Section 77-B of the Bankruptcy Act is granted that either the debtor or the said Carmack will be able to effect a reorganization in this cause, and avers that the only effect of this proceeding will be to prejudice creditors and interested parties by reason of the unsettled condition precipitated in the affairs of the newspaper by postponing the sale, and that it is to the interest of all creditors and all other parties that said petition be forthwith and peremptorily dismissed as not being filed in good faith.

Your respondent, therefore, moves the court to dismiss the petition for the reason that it was not filed in good faith, as shown by the facts and circumstances hereinbefore set out.

BASS, BERRY & SIMS,
Attorneys for Respondent.

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Paul Davis makes oath that he is President of the American National Bank of Nashville; and that he is familiar with the matters and things stated in the foregoing answer; and that the statements made therein are true, and those made on information and belief he verily believes to be true.

PAUL M. DAVIS.

Sworn to and subscribed before me, this the 11th day of July, 1935.

My Commission expires 7-7-38.
(SEAL)

R.C. ROGERS,
Notary Public.

RESPONSE OF O. H. INGRAM AND J. C. BRADFORD ON ORDER TO SHOW CAUSE
and
ANSWER OF O. H. INGRAM AND J. C. BRADFORD TO PETITION

(Filed July 12, 1935)

Come O. H. Ingram and J. C. Bradford, and for response to the order to show cause heretofore entered on June 6,

1935, and for answer to the petition herein, state as follows:

Respondents, O. H. Ingram and J. C. Bradford are the lawful owners and holders of $60,000 in principal amount of 6½% Fifteen Year Debenture bonds dated November 1, 1928, issued by Debtor, Tennessee Publishing Company, and numbered 566 and 625, inclusive. Said bonds have attached to them, unpaid, the semi-annual interest coupons maturing on May 1, 1933, and subsequent to that date. Said bonds are a part of a series of bonds issued by Debtor as of November 1, 1928, and secured by a trust indenture of the same date recorded in book 708, page 69, in the Registers Office for Davidson County, Tennessee.

Said trust indenture executed to secure said series of bonds aggregating $750,000 in principal amount covers all of the properties of the Debtor of every kind whatsoever, exclusive only of materials, supplies, merchandise consumable in the usual course of business, shares of stock, securities, cash, claims, book accounts, and bills and notes receivable. All of the properties of said Debtor have been in the hands of Lit J. Pardue, Receiver, appointed by this Court in the cause entitled C. O. Carpenter, Receiver, v. Tennessee Publishing Company, Number 546 in Equity, for over two years.

In addition to said $750,000 in principal amount of first mortgage bonds with past due interest thereon, said Debtor has unsecured debts of approximately the same amount, so that its total debts are in excess of $1,500,000. All of these claims were filed and allowed by the Standing Master in said receivership cause. The reference to said Master to take proof and report upon said claims was ordered on June 3, 1933, and his report filed on March 20, 1935. Certain exceptions in minor particulars have been filed by the Receiver to said report which are now under consideration by this Court.

Said Receiver, in his operations of said properties of Debtor for the past two years and more, has been unable to earn enough to pay the monthly compensation allowed to him and his attorneys by the Court, and has borrowed money from banks to which he is now indebted in a sum exceeding $25,000 It is to the manifest interest of the bondholders, including these respondents, that this operation be not continued, and that the properties be sold at an early date with as little added expense as possible.

Respondents have investigated the value of said properties and are advised and aver that their value in no way approaches the aggregate of the debts and is probably less than half

the aggregate of said debts. Respondents believe and aver that said low value of said properties in comparison with the outstanding debts is the result of the methods by which Debtor operated said properties for the several years prior to the receivership, in which substantially all income was taken out and used in the payment of large salaries and in the making of loans to or for the benefit of its officers and common stockholders who were in control; and that said condition of Debtor is attributable to said management, which was a fraud upon its bondholders, and not merely to general economic conditions.

So far as these respondents are concerned, and they believe and aver that the other bondholders have the same view, neither the Debtor nor its officers or stockholders have anything to offer which would be of any value to them in a reorganization, from the standpoint of experience, knowledge, or ability in the management of the properties or otherwise; and these respondents will not vote in favor of a reorganization of Debtor.

Respondents are advised and state that the petition herein will not be found to have been filed in good faith within the meaning of Section 77B of the Bankruptcy Act, unless the proceeding offers a probability of benefit to some party, either the Debtor or its creditors. Respondents state that this proceeding offers no hope of benefit to any party for the following reasons:

(1) No benefit is offered to the creditors because everything that could be accomplished in their behalf has been accomplished in the equity receivership now pending, and the proposed proceeding under Section 77B of the Bankruptcy Act would prolong the operation of said properties at a loss, delay the sale, and add materially to expenses.

(2) No benefit is offered to the Debtor because there is no possible equity for the Debtor in the properties, and no probability of any equity if a sale should be postponed, and there is no possibility of a reorganization in which the officers or stockholders of the Debtor could participate in any way.

Respondents would further show that the petition herein was filed on the same day that this Court had set for a hearing in said equity receivership on a motion for the sale of Debtor's properties, and respondents plead and rely upon Debtor's laches in delaying the filing of said petition as a bar

to the relief sought, and as an indication of its lack of good faith.

Respondents now expressly deny and controvert the following allegations of the petition herein:

(a) ". . . that a sale of the property of the Debtor at the present time and under present conditions could be made only at a great sacrifice and would be to the injury and detriment of all classes of creditors."

(b) That Debtor's president, Edward W. Carmack, is or has been in any substantial way "in negotiation with numerous of the creditors of both classes."

(c) That Debtor's said president, Edward W. Carmack, "has reasonable assurance of outside financial support wherein and whereby, if the Debtor is granted the relief under Section 77B of the Bankruptcy Act, it will be able to effect a reorganization thereunder, to the great benefit of its creditors and other interested parties."

Wherefore these respondents pray that the petition herein be disallowed and dismissed, and that the possession of Debtor's properties be not restored to it.

PITTS, McCONNICO, HATCHER & WALLER,
Attorneys for Respondent.

STATE OF TENNESSEE
COUNTY OF DAVIDSON

J. C. Bradford, one of the respondents, makes oath and says that he is familiar with the matters and things stated in the foregoing response and answer, and that the statements therein made are true to the best of his knowledge, information and belief.

J. C. BRADFORD,

Sworn to and subscribed before me this 12th day of July, 1935.

(SEAL)

RUTH EDWARDS,
Notary Public.

My commission expires: 10-20-36.

AFFIDAVIT AS TO MAILING OF NOTICES

(Filed July 13, 1935)

STATE OF TENNESSEE
COUNTY OF DAVIDSON

I, Edward W. Carmack, President of the Tennessee Publishing Company, do solemnly swear that I mailed, in the Postoffice at Nashville, Tennessee, on June 26, 1935, notices to all stockholders, creditors, and Attorneys of records in the case of C. O. Carpenter, Receiver, vs. Tennessee Publishing Company, pursuant to the Order of the Honorable John J. Gore, Federal District Judge.

EDWARD W. CARMACK.

Subscribed and sworn to before me, this 26th day of June, 1935.

(SEAL)

ALINE J. SWAIN,
Notary Public.

My commission expires Feb. 8, 1938.

Tennessee

NASHVILLE, Tenn.—John D. Fletcher, C. E. Rose, W. C. Collier, C. G. Stephens, John T. Benson, Tim H. Moore, P. A. Shelton, E. C. Hass, M. E. Derryberry, W. B. Thurman, T. L. Herbert, G. L. Stroud, T. H. McNish, O. K. Kilvington, Herman Suter, John A. Patten, Mrs. Winnifred Moran, J. H. Allison, G. B. Howard, John A. Pitts, A. H. Mizell, M. S. Combs & Co., J. B. Daniel, J. T. McQuiddy, W. B. Sneed, A. J. Hall, J. H. Smith, C. T. Cheek, D. C. Scales, B. J. Farrar, A. Tillman Jones, A. S. Ransom, A. S. Warren, R. E. Fort, Walter Stokes, Howell E. Jackson, W. C. Collier, W. T. Hardison, A. E. Booth, Henry Beach Carre, John E. Shelton, John H. DeWitt, G. C. Savage, J. H. Hunter, Jr., E. E. French, W. O. Bearden, G. W. Cain, J. H. McPhail, C. A. Craig, W. R. Wills, Jas. H. Malone, Luke Lea, Jr., A. N. Trice, J. O. Cheek, Jas. S. Yowell, C. B. Wallace, John A. Patten, C. M. Shook, G. M. Neely, J. A. Witherspoon, R. E. Folk, Percy W. Lea, Sec., W. T. Teas, Adm., Shepard Place, Meridian Street Church, Cleo Barbee, c/o Nashville Tennessean, L. C. Bligh, c/o Nashville Tennessean, E. P. Carlet, c/o Nashville Tennessean, John M. Cartwright, c/o Rucker & Pearson, Henry Dickinson, Stahlman Bldg. R. J. Gardner, c/o Tennessean, Nashville Warehouse & Elevator Co., J. M. Prather, Sharendale Drive, J. W. Roper, c/o Tennessean, W. A. Seigenthaler, c/o Tennessean, Tennessee Hermitage National Bank (for use and benefit of Commerce Union Bank), George F. Jones, D. B. A., Nashville Printers Roller Works, 911 Berryhill St., Broadway Dis-

count Corporation, Guaranty Mortgage & Loan Co., Apex Oil Corp., 806 16th Ave., No., W. E. Norvell, Jr., Nichol Bldg., E. S. Tanner, c/o Tennessean, Commerce Union Bank, J. G. Lackey, Atty., Stahlman Bldg., Luke Lea, c/o State Penitentiary, Raleigh, N. C., Watagua Trust Co., 160 Second Ave., North, Mrs. Percy Warner Lea, 160 Second Ave. North, Broadway National Bank, Fourth & First Banks, Inc., Guaranty Mortgage & Loan Co., Mrs. Percy Warner, Harding Road, W: G. Bush & Co., 174 3rd Ave. North, American National Bank, O. H. Ingram, 1101 63rd Ave. No., Nashville.

ATTORNEYS—Manier & Crouch, Attys., Baxter Bldg, Shriver & Shriver, Attys., Independent Life Bldg., Pitts, McConnico, Hatcher & Waller, American Trust Bldg., W. E. Norvell, Jr., Nichol Bdlg., Bass, Berry & Sims, American Trust Bldg., P. D. Maddin, American National Bank Bldg., Joseph Higgins, Stahlman Bldg., Wm. J. Wade, Nashville Trust Bldg., Goodpasture & Carpenter, Stahlman Bldg., J. U. Rust, Jr., 145 Windsor Drive, W. Rufus Pardue, 403½ Union St., J. G. Stephenson, Stahlman Bldg., L. J. Pardue, Tennessean, W. B. Marr, American National Bank Bldg., Elkin Garfinkle, Stahlman Bldg., Seay, Stockell & Edwards, American National Bank Bldg., W. S. Noble, Stahlman Bldg., Marion Tillman, Stahlman Bldg., Cornelius, McKinney & Gilbert, Nashville Trust Bldg., J. G. Lackey, Stahlman Bldg., David Keeble, Nichol Bldg.

CHATTANOOGA, Tenn.—R. B. Davenport, Tennessee Electric Power Co., C. S. Moore, Tennessee Electric Power Co,

MEMPHIS, TENN.—Herbert F. Fisher, John T. Walsh, W. C. Knight, Jas. H. Malone, G. T. Fitzhugh, W. A. Percy, Mrs. A. Hamilton, Dr. B. G. Henning, F. D. Smith, K. D. McKellar, T. K. Reddick, E. G. Bell, W. L. Terry, W. L. Terry & E. G. Bell, James Jackson, W. H. Carroll, Thos. J. Jackson, C. H. Heiskell, Thos. W. Briggs, D.B.A. Thomas W. Briggs Co., 16th Floor Columbian Mutual Tower, Standard Oil Co. of La., Geo. C. Love.

KNOXVILLE, TENN.—L. D. Tyson, James Gleason, Receiver, Holston Trust Co., C. O. Carpenter, Receiver, Holston Union Natl. Bank.

ATTORNEYS—Jennings & O'Neil, Fowler & Fowler.

JACKSON, TENN.—E. L. Bullock, Clarence Pefford.

LEWISBURG, TENN.—W. W. Ogilvie, Trustee.

COLUMBIA, TENN.—Wm. J. Howard, J. W. Howard, Otey J. Porter, Jonas T. Annis, Mrs. Coby D. Carmack.
SPRINGFIELD, TENN.—W. H. Simmons.
FRANKLIN, TENN.—W. J. Polk, J. E. Eggleston, Trustee, Frank D. Lander, H. P. Fowlkes, J. C. Eggleston, Trustee.
CENTERVILLE, TENN.—J. B. Walker.
BELL BUCKLE, TENN.—Wm. R. Webb, Jr., W. R. Webb.
SHELBYVILLE, TENN.—E. Shapard, Thos. H. Greer, Chas. S. Ivie, W. J. McGill, Raymond McGill, Wm. McGill.
BROWNSVILLE, TENN.—J. O. Bomar.
PARIS, TENN.—O. C. Barton.
GALLATIN, TENN.—Mrs. Laura S. Branham.
CLEVELAND, TENN.—J. H. Hardwick, C. L. Hardwick.
CLARKSVILLE, TENN.—Collin Goodlett.

Georgia

ATLANTA, GA.—Western Union Tel. Co.

Oklahoma

SAPULKA, OKLA.—D. S. McDougal.

Missouri

ST. LOUIS, MO.—Geo. H. Morrill Co., 1514 Pine St., Hayes Supply Co., 1619 N. Broadway.

Alabama

BIRMINGHAM, ALA.—Postal Telegraph Cable Co.

Louisiana

NEW ORLEANS, LA.—Mergenthaler Linotype Co., 549 Barrone St., Canal Bank & Trust Co., Dart & Dart, Attys., Canal Bank & Trust Co.

New York

NEW YORK, N. Y.—Metro Associated Services, Inc., 130 West 30th St., St. Maurice Valley Paper Co., Ltd., 230 Park Ave., Certified Dry Mat Corp., 342 Madison Ave., Irvin Trust Co., Rec. for R. Hoe & Co., Inc., 138 St. & East River, United Press Association, 220 E. 42nd St., Weil, McGinnis & Sloman, 535 Fifth Ave., L. Martin & Co., 45 E. 42nd Street, Jos. M. Shapiro, D.B.A., Pub. Pattern Service Co., 44 W. 18th St., Walsh & Levine, Attys., 274 Madison Ave.

Michigan

DETROIT, MICH.—Evans & Brisbois, 601 Boyer Bldg.

Ohio

ALLIANCE, OHIO.—Industrial Products Co.
AKRON, OHIO.—Goodyear Service, Inc.

Affidavit As To Mailing Of Notices
First Plan Of Re-Organization

Indiana

INDIANAPOLIS, IND.—American Newspaper Publishers Assn., Circle Tower.

Illinois

CHICAGO, ILL.—Imperial Type Metal Co., 1800 S. 54th Ave., Audit Bureau of Circulation, 165 W. Wacher Drive, Harold M. Pittman Co., 51st Ave. & 33rd St., National Newspaper Service, 326 W. Madison St., C. E. Nichols, 100 N. La-Salle St., Meyer Both Company, Michigan Ave., at 20th, Stevens Davis Co., 1234 W. Jackson Blvd., John M. Branham Co., 360 N. Michigan Ave., Major Market Newspapers, Inc., 400 W. Madison, McNab, Holmes & Levy, Audit Bureau of Circulation, 126 W. Wacher Drive.

JOILET, ILL.—Gerlach-Barkow Co.

FREEPORT, ILL.—Mason & Prestley, Attys., Burgess Cellulose Co., Burgess Cellulose Co.

Pennsylvania

PHILADELPHIA, PA.—Lanston Monotype Machine Co., 24th at Locust St., Peerless Printing Ink Co., 1306 Melon St.

Massachusetts

WORCESTER, MASS.—New England Newspaper Supply Co.

CAMBRIDGE, MASS.—Elliott Addressing Machine Co., 143 Albany St.

Minnesota

MINNEAPOLIS, MINN.—R. H. M. Robinson and G. T. Jaffray, Recs., Minnesota & Ontario Paper Co.

FIRST PLAN OF RE-ORGANIZATION

(Filed July 13, 1935)

DEBTOR proposes as its plan of re-organization, the following:

I

(a) That the value of all of the securities, to-wit: the bonds issued by debtor, be ascertained and judicially de-

termined by this Court.

(b) That the value of all of the assets of debtor be ascertained and judicially determined by this Court. Such values to be itemized as to each specific piece of property, so that the respective rights of claimants thereto, may be ascertained, to the end that the allocable interest of the respective claimants in each specific asset of debtor may be judicially fixed and determined.

(c) That the costs of the Receivership in the case of C. O. Carpenter, Receiver vs. Tennessee Publishing Company, pending in this court, be ascertained and judicially determined.

The above and foregoing matters are to be ascertained by Appraisers to be appointed by the Court, and/or by reference to a Master; and upon the coming in of such appraisal and Master's Report, to be judicially determined and fixed by action of the Court.

The above and foregoing matters to be adjudicated expeditiously; if possible, within thirty (30) days from the date of the filing of this Plan.

II

DEBTOR, upon the adjudication of the values, matters and things set out in (1) above, will issue its 10 Year First Mortgage Bonds in an amount amply sufficient to cover the value of all of its properties so judicially determined, said bonds to be secured by a First Mortgage on all the properties of debtor to be of the denomination of $100.00 each, and to bear interest at the rate of five per cent. (5%) per annum, payable semi-annually. Said bonds to be sold for not less than ninety-seven (97c) cents on the dollar, and said entire issue of bonds marketed by February 1, 1936.

Said entire issue of bonds to be placed in escrow with such party as may be named by the Court, to which party, the proceeds from the sale of said bonds shall be paid; and when all of said issue of bonds shall have been subscribed and paid in to said Escrow Agent, debtor to pay in cash from the donation to be made by its Common Stockholders, as hereinafter set out, any deficiency between the face value of all of said bonds and the price at which said entire issue of bonds shall be sold.

Upon the sale of all of said bonds, and the payment of the deficiency, if any there be, by debtor, the Escrow Agent shall thereupon, pay into Court, or to such party as may be desig-

nated by the Court, a sum equal to the value of all of the properties of debtor, as the same may be adjudicated and determined, as provided in (I) above. And said sum shall be disbursed under the orders of this Court—

(a) To pay the costs in the present proceedings;

(b) To pay the costs of the Receivership in the case of C. O. Carpenter, Receiver v. Tennessee Publishing Company;

(c) To pay any and all other preferred claims, such as taxes, wages, etc., which may have arisen prior to Carpenter Receivership;

(d) The balance to be distributed between the secured and unsecured creditors of Debtor, and the stockholders thereof, as their interests may appear.

III

As soon as it is definitely determined how much will be paid the unsecured creditors from the proceeds of the sale of the proposed bond issue, as above set out, debtor will issue class "A" preferred stock in sufficient amounts, at the par value of $10.00 per share, to make up the deficit, if any shall exist between the total amount paid, or to be paid the unsecured creditors, and the sum of One Hundred Thousand ($100,000) Dollars, to be divided ratably among such unsecured creditors.

Such Preferred Stock class "A", shall bear a fixed dividend of six per cent. (6%) per annum, and shall be non-cumulative and non-voting, and shall be callable at any dividend payment date, at par value thereof, plus earned dividends of the year in which called.

IV

As soon as it is definitely determined how much will be paid the preferred stockholders from the proceeds of the sale of the proposed bond issue, as above set out, debtor will issue class "B" preferred stock in sufficient amounts, at the par value of One Dollar ($1.00) per share, to make up the deficit, if any shall exist, between the total amount paid, or to be paid the preferred stockholders, and the sum of Twenty-five Thousand ($25,000.00) Dollars, to be divided ratably among such preferred stockholders upon the surrender of their present certificates.

Such preferred stock, Class "B" shall bear a fixed dividend of five per cent. (5%) per annum, and shall be noncumulative

and non-voting, and shall be callable at any dividend payment date, at par value thereof, plus earned dividends of the year in which called.

V

Upon the sale of all of debtor's bonds provided to be issued under (II) above, debtor will cause to be donated by its common stockholders, the sum of Fifty Thousand ($50,000) Dollars into the Treasury of debtor, to be used—

(a) To pay any deficiency, as provided in (II) above;

(b) To be used as additional working capital, and/or for betterment and improvements, as the needs of debtor may require.

VI

Debtor proposes, from and after the return to its possession of its properties, to guarantee as follows:

(a) That during the time debtor is in possession of its properties, and pending final consummation of its plan of re-organization, the operating loss during said period will be ten per cent. (10%) less than the average operating loss of the Receiver in the case of—Carpenter, Receiver, vs. Tennessee Publishing Company—for the corresponding periods in the years 1933 and 1934.

(b) From and after the date the value of all of debtor's property shall have been judicially determined by the Court, and provided debtor is in possession of its properties at the time, or then from such time thereafter as debtor may be put into possession of its properties, debtor will pay into Court, or to such party as may be designated by the Court, a sum equal to a rate of six per cent. (6%) per annum,—(the legal rate of interest in the State of Tennessee)—on such adjudicated value of all of the properties so in its possession, such payments to be made monthly, in advance, and to continue until February 1, 1936. Provided, of course, that such payments shall cease upon the final confirmation and completion of the re-organization.

In the event debtor shall fail to reduce the operating loss ten per cent. (10%) as above provided and/or shall fail to pay the interest monthly upon the adjudicated value of all of debtor's property above provided, and such failure shall continue for two months without debtor making good such default by causing to be paid in cash, such difference and

interest. then debtor shall forfeit all right to remain in possession of its properties.

In case debtor shall be restored to the possession of its properties, and if for any reason the Court shall thereafter take said properties out of debtor's possession, then debtor's guarantee as to operating loss and obligation to pay interest upon the adjudicated value of its properties, shall cease and determine.

VII

As and when debtor shall be restored to possession of its property, it will cause to be deposited $20,000.00 in cash, or Cashier's check drawn upon a good and solvent National Bank of the City of Nashville, payable to any party named or designated by the Court, and such sum shall be held by such party and used and applied in the fulfillment of obligations of debtor to reduce loss and pay interest on value of properties as provided in VI above. And in case debtor shall default in the payment of any excess in operating expenses, and/or the payment of interest upon the adjudicated value of all of its properties as hereinbefore provided, then such amounts in default shall be retained by the holder of said deposit; and in case debtor does not make said default good, within two (2) months, by causing the same to be paid in cash into debtor's treasury, then debtor shall forfeit all right to further possession of said property and out of said deposit the holder thereof shall pay the amounts of said default into debtor's treasury and pay the balance of the deposits to the holders of the common stock.

VIII

As and when debtor shall be restored to the possession of its property, it will cause to be executed, a bond in the nature of a Trustee's Bond, in such amount as the Court may determine, to faithfully account for all funds, properties and obligations coming into its possession, and to contain the same conditions and provisions as the present bond of the Hon. Lit. Pardue, Receiver, in the case of Carpenter vs. Tennessee Publishing Company—or as the same may be ordered by the Court.

Likewise, as and when debtor shall be restored to possession of its properties, it will cause a bond to be executed, conditioned that in case, for any reason, the Court shall take possession of said properties from debtor, that at the time the same are so taken, the physical properties shall be in as

good conditiion at the time they are taken; as they were at the time returned to debtor's possession, ordinary wear and tear excepted. The last named bond to be in the penalty of such sum as the Court may fix.

IX

Upon compliance by debtor with each and every obligation herein imposed upon debtor, debtor shall be vested with the title to all of its properties, free and clear of all liens, claims and encumbrances, except those herein assumed, and hereafter to be incurred by debtor, such vestiture of title to be effected by decree of Court, conveyance, or otherwise, as the Court may order. And the deposits provided for in VII above or any balance thereof as the case may be, shall be returned to the Common Stockholders.

Respectfully submitted, this July 13, 1935.

TENNESSEE PUBLISHING COMPANY.
By E. W. CARMACK, President,
Debtor.

WHITE & HOWARD
JORDAN STOKES, JR. & SONS,
Attorneys for Debtor.

AFFIDAVIT OF LUKE LEA, JR.

STATE OF TENNESSEE
COUNTY OF DAVIDSON

(Filed July 13, 1935)

Comes Luke Lea, Jr., who makes oath in due form of law that he is personally acquainted with the facts stated in this affidavit, and knows the same to be true of his own knowledge. That E. W. Carmack, Jr., is the absolute owner in fee of all the shares of the common stock of Tennessee Publishing Company formerly owned by his father, Luke Lea, and that his father has no repurchase agreement, lien or other encumbrance against any of said stock, nor has he any

understanding or agreement of any kind whatever that his father, Luke Lea, is to be interested in any way or manner whatsoever in the efforts and/or results of E. W. Carmack, Jr., in securing the re-organization of the affairs of Tennessee Publishing Company, and that his father, Luke Lea, has no financial interest whatever in said re-organization plans. Neither has this affiant or anyone else connected with the family of affiant any interest whatsoever in any of the matters above set out. Said E. W. Carmack, Jr., is acting for himself and such other associates as may be interested with him, to affiant unknown, and none of the associates of the said Carmack are in anywise connected with affiant or with his father or family, nor have they ever been so far as this affiant knows. Affiant further makes oath that he is Attorney-in-Fact for his father Luke Lea, by registered power of attorney, registered in the Register's office of Davidson County, Tennessee.

LUKE LEA, JR.

Subscribed and sworn to before me on this July 12, 1935.

(SEAL) ALINE J. SWAIN,
Notary Public.

My Commission expires Feb. 8, 1938.

SECOND PLAN OF RE-ORGANIZATION

(Filed August 31, 1935)

DEBTOR offers, as supplement to, or as an alternate of, its plan of re-organization filed and submitted to the Court on July 13th, 1935, the following:

I

(a) That the value of all of the securities to-wit: the bonds issued by debtor, be ascertained and judicially determined by the Court in this proceeding.

(b) That the value of all of the assets of debtor be ascertained and judicially determined by the Court in

this proceeding. Such values to be itemized as to each specific piece of property, so that the respective rights of claimants thereto, may be ascertained, to the end that the allocable interest of the respective claimants in each specific asset of debtor may be judicially fixed and determined.

(c) That the costs of the Receivership in the case of C. O. Carpenter, Receiver vs. Tennessee Publishing Company, pending in this Court, be ascertained and judicially determined.

The Debtor believes that the most effective and accurate manner of ascertaining the foregoing matters would be by ordering a reference to a Master; and especially so as to the matter of placing a value upon the outstanding bonds or securities, as set out in (a) above. And, if it will save time and expense, Debtor has no objection to the evidence, that has heretofore been taken before the Master, the Honorable Byrd Douglas, in the case pending in this Court of C. O. Carpenter, Receiver vs. Tennessee Publishing Company being filed with and considered by the Master appointed herein; but, of course, reserving the right of the debtor and any other interested party, to question the validity, equity, justness and amount of securities, bonds or claims presented to the Master in this cause; and to offer evidence in support thereof before said Master. And, that all claims of indebtedness against the debtor be required by the Court to be duly filed in this proceeding; and to be submitted by the Court to the Master to hear proof, as above set out, and to report thereon. Also, to report as to the value of any and all securities or outstanding bonds against debtor, as provided by the statute designated "77B".

And further that the value of all of the assets of the debtor, as set out in paragraph "(b)" hereinbefore be submitted by the Court to said Master to hear proof, and report on this matter; or, if the Court deems it more effective and proper, let said assets be appraised.

Upon the coming in of the report of the Master, as above set out, on matters submitted to him, and, if, in addition to said Master's report, there is also an appraisal, that the same be judicially determined and fixed by action of the Court in this cause, after a hearing thereon, in accordance with the rules of the Court applicable thereto.

II

Debtor, upon adjudication of the values, matters and things, set out in paragraph "I" above, will issue its individual ten year first mortgage bonds in an amount amply sufficient to cover the value of all of its properties so judicially determined. Said bonds to be secured by a first mortgage on all of the properties of debtor; to be of a denomination of One Hundred ($100.00) Dollars each, and to bear interest at the rate of five (5) percent per annum, payable semi-annually. Said bonds to be sold for not less than ninety-seven (.97) cents on the dollar. Said entire issue of bonds to be marketed within whatever time limit the Court sees proper to fix, reasonable, fair and just, and not to be later than Feby. 1, 1936.

Said entire issue of the new bonds to be placed in escrow with such party as the Court may designate, to which party the proceeds from the sale of said bonds shall be paid. And, when all of said issue of bonds shall have been subscribed and paid into said escrow agent, the debtor will pay in cash from the donations to be made by its common stockholders, as hereinafter set out, any deficiency between the face value of all of said bonds and the price at which said entire issue of bonds shall be sold.

The debtor, to further assure this Honorable Court of its good faith, sincerity and ability to carry out its plan of re-organization, will, within five days, after the approval by the Court of this alternate plan of re-organization, submit to the Court a guarantee or underwriting of the sale of its aforesaid proposed securities or bonds to the extent of Three Hundred Thousand ($300,000.00) Dollars; the amount stated to be maximum value of all properties of debtor in the sworn answer in this cause of the Receiver of the Holston Union Bank, of Knoxville, and a holder of a portion of the outstanding bonds claimed against debtor, and the petitioner asking for the sale of debtor's property in the Receiver Case; or, if the creditors, entitled thereto, prefer, debtor will deliver to them its new securities provided for herein.

The said guarantee or underwriting to be furnished by the debtor within five days, will be by such parties and in such manner as will thoroughly and positively satisfy the Court that said amount of money, Three Hundred Thousand ($300,000.00) Dollars will be paid in for said securities, within the period as hereinbefore stated, namely, at such time as the Court may declare to be just, equitable and reasonable, and, in no event, to be later than Feby. 1, 1936. Otherwise stated, the debtor guarantees the payment of Three Hundred Thou-

sand ($300,000.00) Dollars as payment for all of the property of debtor, if that amount, is fixed by the Court as a reasonable value of said property. Within five days after this plan is adopted by the Court, debtor will furnish to the Court ample and satisfactory evidence of its ability to live up to this guarantee.

It is further a part of the plan that, should the value of debtor's property be judicially determined herein to be less than Three Hundred Thousand ($300,000.00) Dollars, in that event, the difference between the value so fixed and the Three Hundred Thousand ($300,000.00) Dollars, shall be paid into the Treasury of debtor and used as additional working capital.

Upon the sale of said bonds and the payment of the deficiency, if any, by the Debtor, as herein provided, the escrow agent, shall, thereupon, pay into the Court, or to such party as may be designated by the Court, the sum equal to the value of all of the properties of debtor as the same may be adjudicated and determined, as provided in paragraph "I" herein. Said sum shall be disbursed under orders of the Court.

(a) To pay the costs in the present proceedings;

(b) To pay the costs of the Receivership in the case of C. O. Carpenter, Receiver v. Tennessee Publishing Company;

(c) To pay any and all other preferred claims, such as taxes, wages, etc., which may have arisen prior to Carpenter Receivership;

(d) The balance to be distributed between the secured and unsecured creditors of Debtor, and the stockholders thereof, as their interests may appear.

III

As soon as it is definitely determined how much will be paid the unsecured creditors from the proceeds of the sale of the proposed bond issue, as above set out, debtor will issue class "A" preferred stock in sufficient amounts, at the par value of $10.00 per share, to make up the deficit, if any shall exist between the total amount paid, or to be paid the unsecured creditors, and the sum of One Hundred Thousand ($100,000.00) Dollars, to be divided ratably among such unsecured creditors.

Such preferred Stock, class "A", shall bear a fixed dividend

of six per cent. (6%) per annum, and shall be non-cumulative and non-voting, and shall be callable at any dividend payment date, at par value thereof, plus earned dividends of the year in which called.

IV

As soon as it is definitely determined how much will be paid the preferred stockholders from the proceeds of the sale of the proposed bond issue, as above set out, debtor will issue class "B" preferred stock in sufficient amounts, at the par value of One Dollar ($1.00) per share, to make up the deficit, if any shall exist, between the total amount paid, or to be paid the preferred stockholders, and the sum of Twenty-five Thousand ($25,000.00) Dollars, to be divided ratably among such preferred stockholders upon the surrender of their present certificates.

Such preferred stock, Class "B" shall bear a fixed dividend of five per cent. (5%) per annum, and shall be non-cumulative and non-voting, and shall be callable at any dividend payment date, at par value thereof, plus earned dividends of the year in which called.

V

Upon the sale of all of debtor's bonds provided to be issued under (II) above, debtor will cause to be donated by its common stockholders, the sum of Fifty Thousand ($50,000.00) Dollars into the Treasury of debtor, to be used—

(a) To pay any deficiency, as provided in (II) above;

(b) To be used as additional working capital, and/or for betterment and improvements, as the needs of debtor may require.

VI

Debtor, proposes, from and after the return to its possession of its properties, to guarantee as follows:

(a) That during the time debtor is in possession of its properties, and pending final consummation of its plan of re-organization, the operating loss during said period will be twenty-five percent. (25%) less than the average operating loss of the Receiver in the case of—Carpenter, Receiver vs. Tennessee Publishing Company—for the corresponding periods in the years 1933 and 1934.

(b) From and after the date the value of all of debtor's property shall have been judicially determined by the

Court, and provided debtor is in possession of its properties at the time, or then from such time thereafter as debtor may be put into possession of its properties, debtor will pay into Court, or to such party as may be designated by the Court, a sum equal to a rate of six per cent. (6%) per annum,—(the legal rate of interest in the State of Tennessee)—on such adjudicated value of all of the properties so in its possession, such payments to be made monthly, in advance, and to continue until February 1, 1936. Provided, of course, that such payments shall cease upon the final confirmation and completion of the re-organization.

In the event the debtor shall fail to reduce the operating loss twenty-five percent. (25%) as above provided, and/or shall fail to pay the interest monthly upon the adjudicated value of all of debtor's property above provided, and such failure shall continue for one month without debtor making good such default by causing to be paid in cash, such difference and interest, then debtor shall forfeit all right to remain in possession of its properties.

In case debtor shall be restored to the possession of its properties, and if for any reason the Court shall thereafter take said properties out of debtor's possession, then debtor's guarantee as to operating loss and obligation to pay interest upon the adjudicated value of its properties, shall cease and determine.

VII

As and when debtor shall be restored to possession of its property, it will cause to be deposited Twenty-five Thousand ($25,000.00) Dollars, in cash, or Cashier's check drawn upon a good and solvent National Bank of the City of Nashville, payable to any party named or designated by the Court, and such sum shall be held by such party and used and applied in the fulfillment of obligations of debtor to reduce loss and pay interest on value of properties as provided in VI above. And, in case debtor shall default in the payment of any excess in operating expenses, and/or the payment of interest upon the adjudicated value of all of its properties as hereinbefore provided, then such amounts in default shall be retained by the holder of said deposit; and in case debtor does not make good said default, within one (1) month, by causing the same to be paid in cash into debtor's treasury, then debtor shall forfeit all right to further possession of said property and out of said deposit the holder thereof shall pay the amounts of said default into debtor's treasury and pay

the balance of the deposits to the holders of the common stock.

VIII

As and when debtor shall be restored to the possession of its property, it will cause to be executed, a bond in the nature of a Trustee's bond, in such amount as the Court may determine, to faithfully account for all funds, properties and obligations coming into its possession, and to contain the same conditions and provisions as the present bond of the Hon. Lit Pardue, Receiver, in the case of Carpenter vs. Tennessee Publishing Company—or as the same may be ordered by the Court.

Likewise, as and when debtor shall be restored to possession of its properties, it will cause a bond to be executed, conditioned that in case, for any reason, the Court shall take possession of said properties from debtor, that at the time the same are so taken, the physical properties shall be in as good condition at the time they are taken, as they were at the time returned to debtor's possession, ordinary wear and tear excepted. The last named bond to be in the penalty of such sum as the Court may fix.

IX

Upon compliance by debtor with each and every obligation herein imposed upon debtor, debtor shall be vested with the title to all of its properties, free and clear of all liens, claims and encumbrances, except those herein assumed, and hereafter to be incurred by debtor, such vestiture of title to be effected by decree of Court, conveyance, or otherwise, as the Court may order. And the deposits provided for in VII above or any balance thereof as the case may be, shall be returned to the Common Stockholders.

Respectfully submitted, this 30th day of Aug., 1935.

TENNESSEE PUBLISHING COMPANY.

By EDWARD W. CARMACK,
President
DEBTOR

WHITE & HOWARD
ROBERTS & ROBERTS
LEWIS S. POPE,
Attorneys for Debtor.

FILATION ORDER OF SECOND PLAN

(Filed Sept. 13, 1935)

In this matter the debtor appeared this day and presented a supplemental or alternate plan of reorganization ,wherefore, it is ordered and adjudged that the debtor be and is hereby authorized and permitted to file this supplemental or alternate plan of reorganization in this cause. This order is made without prejudice as to disposition of any pending motions.

This the 30th day of August, 1935.

O K. as to Form.

CECIL SIMS
W. E. NORVELL, JR.
For Commerce Union Bank, ET AL

ENTER:

GORE,
Judge.

DEBTOR'S MOTIONS TO APPROVE

(Filed Sept. 13, 1935)

Comes the debtor, Tennessee Publishing Company and moves the Court:

(1) To issue an order proving its supplemental or alternate plan filed in this Court on the 31st day of August, 1935.

(2) To return the property to the debtor in accordance with the plan, the debtor to operate the same under the control and supervision of this Court in accordance with the statute and the plan. Said order to take effect upon the deposit of the money and guaranties offered in the plan.

ROBERTS & ROBERTS
WHITE & HOWARD
LEWIS S. POPE,

FILATION ORDER OF PETITION TO STAY

(Filed Sept. 13, 1935)

Honorable E. W. Carmack, President of Debtor Corporation, has this day presented a petition and motion, and asks leave of the Court to file same in this cause.

It is ordered and decreed by the Court that said petition and motion be filed, and opposing counsel will be given notice of the filation of same, and said motion and petition will be set down for hearing at some future date.

This the 12th day of September, 1935.

Approved For Entry:

GORE,
Judge.

Attorneys for Petitioner.

DEBTOR'S PETITION TO STAY

(Filed Sept. 13, 1935)

Defendant would respectfully show to the Court:

I

That in the cause of C. O. Carpenter, Receiver, v. Tennessee Publishing Co., a Receiver, appointed by this Court, has been operating the business and in control of the properties of this Debtor for more than two years, and that a reference has been had to ascertain the amounts owed by this defendant and to fix any liens, if any, held by the creditors of this defendant. That pursuant thereto the Special Master appointed has filed his report and various exceptions thereto have been filed.

II

Debtor would further show that on the 6th day of June, 1935, it filed its petition in this Court to be reorganized under

Section 77-B of the Bankruptcy Act, and that on the
date this Court entered an order approving said petiti
filed in good faith. This debtor would show the Cour
it is advised that the filing of said petition and the en
the order aforesaid has operated, as a matter of law, t
all proceedings in the cause of C. O. Carpenter, Receiv
Tennessee Publishing Co., and that no action should be
either for confirmation of the Master's report or, the h
of exceptions thereto, or for the sale of the property, s
as the matter of Tennessee Publishing Company, Debt
pending.

This debtor would further show that its rights and
ests in said reorganization proceeding might be adv
affected by any decisions or further orders made in the
said Receivership case. And that no decisions, actio
proceedings should be taken in this case until a petiti
reorganization is disposed of.

III

Petitioner would further show to the Court that re
a petition has been filed in the case of C. O. Carpente
ceiver vs. Tennessee Publishing Co., by certain unse
creditors of petitioner, in which petition said unsecured
itors are raising very serious questions as to the vali
certain bonds or secured claims, which have been file
undertaken to be proven in said Receivership case, a
included in the report filed by the Master therein. Pet
felt it advisable to apprize the Court of this petition
the seriousness of the charges therein made.

Premises Considered, Petitioner Prays:

That an order be made and entered in this cause su
ing any all further action of every kind in the case of
Carpenter, Receiver v. Tennessee Publishing Co., so l
the petition herein is still pending and undisposed of.

Grant such further and other relief as petitioner, und
law and facts, may be entitled to.

TENNESSEE PUBLISHING COM
By E. W. CARMA
Pre

ROBERTS & ROBERTS
WHITE & HOWARD
LEWIS S. POPE,
Attorneys for Petitioner.

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Personally appeared before me, A. Lawson Davis, a

Public in and for the County of Davidson, State of Tennessee, the aforesaid E. W. Carmack, to one well known, who makes oath that he is President of the Tennessee Publishing Co., and that the facts stated in the foregoing petition are true.

E. W. CARMACK.

Sworn and subscribed to before me this 12th day of Sept., 1935.

My commission expires Oct. 16, 1935.

(SEAL) A. LAWSON DAVIS,

COURT CAPTION, SEPTEMBER TERM, 1935.

Being the fourth Monday of September, 1935, be it remembered that at a District Court of the United States begun and held for the Nashville Division of the Middle District of Tennessee at the Federal Court Room in the City of Nashville, Tennessee, within said District, and the Sixth Circuit on the fourth Monday, it being the 23rd day of September, 1935.

AMENDED AND SUPPLEMENTAL ANSWER OF AMERICAN NATIONAL BANK, A CREDITOR, AND AMENDED AND SUPPLEMENTAL MOTION OF SUCH CREDITOR TO DISMISS THE DEBTOR'S PETITION

(Filed October 7, 1935)

Comes the American National Bank of Nashville, a creditor, and shows to the Court that it has heretofore filed its answer and motion to dismiss the debtor's petition in response to the order to show cause, which motion the Court has heretofore taken unto consideration and is now pending and undisposed of. Said answer and motion are here and now referred to and all of the allegations therein contained are adopted and reaffirmed and said American National Bank of Nashville, by way of amendment and supplement thereto, here and now avers:

I

Upon information and belief that no one of the persons interested in the proposed plan of reorganization had any interest in the Tennessee Publishing Company either as stockholder, officer, employe, director or otherwise, prior to the day before the filing of the petition in this cause, to-wit, June 6, 1935, and that on or about June 5, 1935, the day before the time fixed for the court to act upon the motion for an order of sale in the equity receivership cause, the said Edward Carmack and his associates acquired the entire common stock of the Tennessee Publishing Company, knowing that it was absolutely worthless, for which they paid no consideration whatsoever other than the purported cancellation of a small note signed by Luke Lea and Luke Lea, Jr., both of whom they knew to be insolvent, and the note being barred by the Statutes of Limitations, the whole purpose of the transaction being to engage in a highly speculative venture, the plan being to harass the bondholders and other creditors whose claims have been allowed in the receivership cause by dilatory tactics, and that such parties do not come within the intent and meaning of Section 77B of the Bankruptcy Act and have no standing whatsoever in this court as proper parties for the reorganization of the corporation, and are not acting in good faith. The position of said parties is that of one seeking to, by a speculative position against an insolvent and by dilatory tactics, the presentation of phantastic and chimerical plans, without the slightest hope of success, force bondholders and other legitimate creditors of the insolvent corporation to make some settlement, adjustment or compromise so as to reap a

speculative profit out of the venture. This creditor stands ready to offer proof with respect to these allegations, if required by the court.

II

At the time the court permitted the petition for reorganization to be filed a decree was entered expressly providing in substance that the filing of said petition should not interfere with the hearing of the exceptions to the report of the Standing Master in the receivership cause or the judgment of the court thereon, and at the time of the hearing on the order to show cause why said petition should not be dismissed for the reason that it was not filed in good faith, on July 6, 1935, the court stated in effect that said petition would be peremptorily dismissed unless it was forthwith amended so as to provide as an express condition thereof that the respective claims, rights, liens and creditors should be as adjudicated and determined in said equity cause, whereupon the petitioning debtor, through its counsel, solemnly affirmed in open court that it would so amend its petition. The petitioning debtor has not subsequently filed any such amendment and, on the other hand, has filed a supplemental or alternative plan of reorganization which fails to incorporate any such condition precedent or provision and, which, expressly provides that all of the prior proceedings in the equity receivership cause shall be set aside and rendered nugatory and that new proceedings shall be instituted and begun before a Master on a new reference to reinvestigate and ascertain the rights, claims and liens of all parties in interest. As heretofore shown to the court, such a proceeding will retain these matters in court for at least an additional twelve months notwithstanding the fact that it is admitted by the petitioning debtor that its assets are not sufficient in value to pay its bondholders more than a fraction of their obligations, with no dividends to unsecured creditors, the preferred stock and common stock being absolutely worthless, and the receivership, according to a recent audit and appraisal, being in the meantime operating at a loss.

III

The proposed plans of reorganization submitted by the petitioning debtor are wholly impracticable, have not the slightest chance of being successful, and further proceedings in this cause will be absolutely futile. As will be seen from the plans of reorganization, the petitioning debtor has no real estate and its assets consist largely of machinery, equipment,

circulation, good will and accounts receivable, which are said by the petitioning debtor to be worth approximately $300,000.00, against a bond indebtedness exceeding $900,000.00 and an unsecured indebtedness exceeding $300,000.00 Under these circumstances the petitioning debtor proposes to issue its own ten-year bonds in the principal sum of $300,000.00, secured only by a lien upon these assets, and to sell the same to the public over a long period of time so as to yield a net sum of $291,000.00, which sum is to be used to pay off the debts of the Receiver which now approximate $25,000.00, the cost and expense of the receivership, which will no doubt equal or exceed the sum of $25,000.00, leaving a sum less than $250,000.00 to be paid out to the bondholders and unsecured creditors. It is well known that at the present time no bond can be sold to the public and is not the subject of legal investment for trust funds in Tennessee if the total principal of said bonds exceeds 50% of the appraised value of sound real estate. The petitioners seek, however, to issue bonds in a principal sum equal to the alleged value of the property, which consists only of machinery and intangible assets. It is submitted that there can be no reasonable hope of success of any such plan, and while the petitioner states that it will provide underwriters to guarantee the sale of the bonds it does not disclose the names of such underwriters and this creditor avers that no such underwriter exists and none can be provided of a required solvency to guarantee any such undertaking.

IV

Up to the time of the filing of this supplemental answer and motion, although several hearings have been had with notice to all creditors, not a single creditor, secured or unsecured, has approved or consented to the proposed plan of reorganization and, on the other hand, bondholders holding $548,000.00 in principal amount of bonds out of a total issue of $750,000.00 have appeared in open court and expressly and emphatically disapproved of said plan and declined to agree thereto, and unsecured creditors holding more than 50% of all of the unsecured debts have likewise appeared in open court and expressly disapproved of the plan and refused and declined to agree thereto. It is averred that under no circumstances will the necessary consent of creditors, as required by the provisions of Section 77B of the Bankruptcy Act, be obtained so as to permit the approval by the court of the proposed plans of reorganization.

V

If said plans of reorganization are to be construed as pro-

posing that the court order an appraisal of the assets of the debtor which are subject to the lien of the deed of trust to secure the bondholders, with a view of tendering cash or securities in the principal sum of approximately $300,000.00 in settlement and satisfaction of the lien of said bondholders and for the purpose of freeing the respective properties from said lien, it is averred that such proposal has been unanimously rejected by holders of all of said bonds who have in open court and by pleadings in this cause refused and declined to agree thereto. Said bonds were issued by the debtor on November 1, 1928, and secured by a deed of trust executed the same date by the debtor to Liberty Central Trust Company and E. J. Miller as Trustees, duly recorded in the Register's Office of Davidson County, Tennessee, as required by the laws of Tennessee, and a true copy of said indenture is filed herewith and made a part hereof as Exhibit "A". This creditor avers that prior to the passage of the amendment to the Bankruptcy Act, known as Section 77B, the holders of said bonds, including this creditor, had acquired a fixed interest and property right under the provisions and conditions of said indenture against the property and assets of the Tennessee Publishing Company, as set out and described in said indenture, and that under the laws of Tennessee prior to the passage of said amendment by Congress and at the present time said bondholders, as a matter of property rights, were entitled to have said properties and assets foreclosed and sold at public auction either through proceedings in equity in any court of competent jurisdiction or by advertisement by the Trustees, as provided in said indenture, and therefore any appraisal and payment to the bondholders of any amount in cash less than the full amount required to pay and satisfy their total indebtedness, including interest, without their consent, or involuntary scaling down of their indebtedness to the alleged present value of the property, would be a violation of the Fifth Amendment to the Constitution of the United States and would constitute the taking of this creditor's property without due process of law, and if so construed said amendment to the Bankruptcy Act known as Section 77B is wholly inoperative, unconstitutional and void. This creditor here and now asserts and claims the protection of the provisions of the Fifth Amendment to the Constitution of the United States and specifically relies upon such rights and protection and, therefore, shows to the court that said proposed plan of reorganization, which apparently is conditioned solely upon depriving this creditor of its constitutional rights, can not by any possibility ultimately succeed and, therefore, said debtor's petition should be dismissed.

In this connection it is shown to the court that all of the holders of said bonds secured by the indenture aforesaid have heretofore and do now refuse to consent to a sale of the mortgaged property to the debtor, and do refuse to consent to the delivery and transfer of said property to the debtor upon the payment of any appraised value to such bondholders unless said sums shall be sufficient to fully satisfy and pay the entire indebtedness of said bondholders, including principal and interest and do refuse to consent to accept securities or bonds to be executed under the proposed plan of reorganization in lieu of those now held by such bondholders.

It is further shown to the court that at the time of the passage by Congress of the amendment to the Bankruptcy Act known as Section 77B, this creditor and the other bondholders, under the terms of the indenture and under the laws of the State of Tennessee, and under the proceedings in the equity receivership cause known as C. O. Carpenter, Receiver, vs. Tennessee Publishing Company, pending in this court, had acquired substantive right in the specific property covered by said indenture, such property rights being as follows:

(1) The right to retain the lien until the indebtedness thereby secured is paid.

(2) The right to realize upon the security by a judicial public sale, or by sale by the Trustees, as provided in said indenture.

(3) The right to determine when such sales shall be held, subject only to the discretion of the court and to the terms and conditions of said indenture.

(4) The right to protect its interest in the property by bidding at such sale whenever held and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of proceeds of a fair competitive sale, or by taking the property itself.

(5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

This creditor avers that insofar as said proposed amendment is retroactive and seeks to interfere with, destroy or impair said fixed property rights it is violative of the Fifth Amendment to the Constitution of the United Sates and is, therefore, inoperative and void. The proposed plan of reorganization invokes and depends entirely upon the various

provisions of said amendment to the Bankruptcy Act which, if so construed, are wholly unconstitutional and void, and hence said petition should be dismissed as having no reasonable prospects for successful reorganization.

VI

This creditor further avers that a bona fide offer to purchase all of the assets at a sum greatly in excess of that proposed in the plan of reorganization has this day been filed by Paul M. Davis in the cause of C. O. Carpenter, Receiver, vs. Tennessee Publishing Company, being the equity receivership cause now pending in this court, and that such offer further proposes that it may be treated as an upset bid if the property is offered sold at a public auction under the terms and provisions of said deed of trust, with proper guaranties and assurances of the appearance by the said Paul M. Davis and the beginning of said bidding at such upset price. A true copy of said proposed offer as filed in said receivership cause is filed herewith as Exhibit "B". It is averred that under this situation and in view of the greatly increased price and consideration contained in said offer as compared with the proposed plan of reorganization, said plan of reorganization has no reasonable chance of successful acceptance by the creditors, and it is manifestly to the interest of all parties, including the debtor, that said petition for reorganization be dismissed and the properties immediately ordered sold under said written offer in said equity receivership cause.

Wherefore, for the reasons shown in this amended and supplemental answer, as well as those shown in its prior answer, this creditor here and now moves the court to dismiss said petition as not being filed in good faith for the reasons heretofore shown.

BASS, BERRY & SIMS,
Solicitors.

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Paul M Davis makes oath that he is President of the American National Bank of Nashville; that he is familiar with the matters and things stated in the foregoing amended and supplemental answer; and that the statements contained therein

are true and those made on information and belief he verily believes to be true.

PAUL M. DAVIS.

Sworn to and subscribed before me, this 7th day of October, 1935..

BUFORD WILSON,
Notary Public.

(SEAL)

My Commission expires July 8th, 1936.

MOTION TO STRIKE

(Filed October 10, 1935)

Comes the debtor, Tennessee Publishing Company, and moves the Court to strike and dismiss the instrument termed by the American National Bank "Amended and Supplemental Answer of American National Bank, a creditor," and "Amended and Supplemental Motion of such Creditor to Dismiss the Debtor's petition," and for the cause of said motion would show:

I

Said instrument was filed without permission of this Court, in violation of Rules 19 and 30, governing the filing of amendments and supplements.

II

Because said instrument was not filed within the time specified and allowed by this Court for the filing and proving of the matters and things set out in said instrument. Debtor would show that petitioner filed its petition for corporate reorganization on the 6th day of June, 1935, and that on that date this Court entered an order approving said petition as

proper, and filed in good faith, and fixing a thirty day period for interested parties to show why said petition should not be sustained. The American National Bank having failed to show cause within said thirty day period cannot now come in one hundred and twenty-two days later and attempt to show cause.

III

Because the matters and things set out and alleged in said instrument were wholly immaterial and absolutely irrevelant to the proceedings in this cause.

Debtor would show that said instrument contains many allegations relative to the stock ownership in the debtor, which allegations have previously been made in open court by representatives of this creditor, and concerning which not one word of proof has ever been introduced, whereas, debtor has introduced uncontradicted testimony showing the entire history of the proceeding and the connection of the present stockholders with the debtor, and all of which matters and things have been heretofore specifically held wholly immaterial and irrelevant by this Court, and having been held that the debtor corporation was acting in the premises and not the stockholders of the debtor corporation.

IV

American National Bank further makes certain allegations as to delays occasioned by these proceedings, and losses incurred by the operation of the receivership. This allegation is again wholly immaterial and irrelevant for the reason that the record in this proceeding plainly shows the debtor corporation has endeavored to terminate these losses and offered to pay the interest on the value of the properties, and turned into court for this purpose, in Cashier's checks, $20,000.000; all of which was resisted by this very creditor, and said losses, if they are occurring, and said delay, if it does occur, are in no wise attributable to this debtor, but primarily the result of the acts of the American National Bank in the premises.

V

The American National Bank continues to refer to the proposed plan of re-organization as "wholly impracticable" and "presentment of fantastic and chimerical plans without the slightest hope of success." Such allegations and statements are wholly irrelevant and immaterial as are all allegations concerning the difficulties of the debtor in its pro-

posed plan of re-organization, because these allegations can be readily determined by the Court by giving the debtor very definite instructions to produce its funds, which the debtor has stood ready to do all the time in spite of the wholly unfounded and unsupported allegations of the American National Bank. Debtor would show that the continual repetition of the statements of the American National Bank to the effect that debtor cannot produce the funds necessary to carry out the proposed plan of re-organization is an unwarranted imposition upon the time of this Honorable Court. The fact that the creditor continues to assert that the debtor cannot comply with its plan of re-organization is tantamount to admission that if the plan can be compiled with by the debtor that it is entitled to have it ratified and confirmed by the Court.

VI

The American National Bank's allegation as to the unconstitutionality of Section 77-B comes in the face of numerous decisions in the Federal Courts upholding the same, and there is no reported decision to the contrary. The plan of the debtor is in absolute accord with the provisions of the Act itself, and the steps taken by the debtor have been in absolute accord with the terms and provisions specially laid down in Section 77-B, Amendment to the Federal Bankruptcy Act. Debtor would show that there will be paid into Court under its plan of re-organization the full value of the assets of the debtor, as determined by an appraisal ordered by this Court and as provided in said Act, which appraisal, or some modification thereof, has been, or will be judicially determined as constituting the value of said assets. Wherefore, debtor would show that neither this creditor, American National Bank, nor any other creditor of the debtor corporation, is being deprived of any property without due process of law. Said proposed plan of re-organization is in nowise a violation of any provision of the Constitution of the United States.

VII

The instrument filed by American National Bank on October 7, 1935 moves for the dismissal of debtor's petition on the ground that same is not filed in good faith, but none of the allegations in said instrument bear on this question at all, the same being wholly immaterial and irrelevant thereto. Debtor would show that if, for any reason, this Court should fail to approve its proposed plan of re-organization it is entitled to an opportunity to amend said plan of re-organization in accordance with such rulings as the Court may hand

down and that the entire record in this matter shows that the re-organization petition of debtor was filed in the highest good faith and has been pursued with the utmost diligence, in fact, to such a degree that attorneys for this creditor, American National Bank, have objected to the numerous times the matter has been brought before this Court by the debtor, in its efforts to proceed with the utmost reasonable dispatch. This debtor has done everything possible to expedite this matter, having filed its first proposed plan on the first day set by this Court, at which time the Court permitted debtor to present same, has tendered into Court $20,000.00 in cash, and has offered to deposit $25,000.00 to guarantee curtailment of the operating losses shown in the Receiver's statements, and to pay interest on the appraised value of debtor's property when same should be determined, has offered to pay said appraised value in full, and has taken each and every step which it conceived would expedite this matter, or which the Court has suggested might expedite the same.

Debtor has been forced to work out his re-organization plans without the benefit of having its properties restored to its possession, and while the same was actually under the control of a receiver.

On the other hand, said American National Bank has not co-operated for the purpose of obtaining a speedy termination of this matter, but has stubbornly resisted every move made to that end, and, as a matter of fact, has announced in advance its opposition to any and all plans which might be submitted by the debtor, before it had any knowledge of what plan or plans or offers debtor would propose, which position has been taken with utter indifference to the rights and possible benefits of other creditors and interested parties in this proceeding.

VIII

Said alleged pleading is too vague, indefinite, and uncertain in its allegations to be made the basis of any decree or to permit the introduction of evidence in support thereof.

Wherefore, debtor moves that the instrument filed on October 7, by American National Bank, be ordered stricken from the record in this proceeding.

WHITE & HOWARD,
Attorneys.

Notary Public.

ORDER ALLOWING FILING OF DEBTOR'S PETITION

(Filed October 11, 1935)

The debtor, Tennessee Publishing Company, moved the Court for leave to file its petition with exhibits "A" to "H" inclusive, seeking to have the Court order the Clerk to file the Report of the Appraiser, filed in the Receivership case of C. O. Carpenter, etc., vs. Tennessee Publishing Company, filed in this cause, which motion was by the Court granted, and same was filed, subject to all legal defenses.

This the 11th day of October, 1935.
O.K.

GORE, Judge.

DEBTOR'S PETITION FOR FILING OF APPRAISER'S REPORT

(Filed October 11, 1935-

Comes debtor, Tennessee Publishing Company and files this its petition, after having obtained leave of Court so to do, and respectfully avers:

That heretofore it filed its original plan of re-organization under and in accordance with the Bankruptcy Act as amended by Section 77-B and which said plan was filed on July 13, 1935, to which reference is expressly made.

Thereafter, a supplemental or alternate plan of re-organization was filed on the ..... day of ....., 1935. In both said plans debtor sought to have the value of all its assets ascertained and judicially determined by the Court, either by a reference to a Master or by an appraisal. In this connection debtor specifically refers to paragraph 1 of said original and supplemental or alternate plan of re-organization, and asks that said supplemental or alternate plan be treated as a part hereof, as fully as if copied at length herein.

Therefter, a hearing was had at Monteagle, Tennessee, on July 13, 1935, and after considerable argument and discus-

sion of said plan of re-organization, and other matters germane thereto, as well as upon a motion for an order of sale made by certain bondholders of debtors, this Court stated:

"THE COURT:

I will tell you what I have in mind; it is going to protect you all right enough. Today they are making application for me to order a sale, and before I do it, I want an upset price and in the meantime, while we are getting an upset price—that has to be done before I can make an order of sale—if you can then assure me that you can protect these bondholders to the extent of the upset price of that property, then I will be awfully glad to entertain your plan. I am not dismissing your plan at this time, I am not doing that at all."

After some further discussion the following colloquy took place between the Court and counsel:

"THE COURT: All right. I am going to order a sale—not order a sale, I am going to order an appraisal today.

MR. NORVELL: What length of time?

THE COURT: How do you think we ought to get at the appraisal?

MR. SIMS: We will confer, there are companies who make appraisal.

THE COURT: You agree, if you can, upon appraisers, all of you, and if you cannot, submit the names to me and I will decide.

MR. NORVELL: You have decided the matter temporarily?

THE COURT: Yes.

MR. NORVELL: Something ought to be done with this property, I am not butting in, but let's don't let it rock along; I make this suggestion, if we can't agree on appraisers let us have a discussion at an early date, Tuesday or Wednesday, and if we don't agree submit it to your Honor.

MR. SIMS: There are people who regularly make appraisals of newspaper property.

THE COURT: I guess Mr. Carmack knows who they are.

MR. LEVY: Do I understand, in making this appraisal, this is a preliminary step to an order of sale?

THE COURT: I will use it for all purposes.

MR. NORVELL: Then I will ask your Honor, whether appraised by appraisers of your selection, or by agreement, Tuesday or Wednesday if we don't agree—make it as short a time as you can.

THE COURT: It ought to be sold. Can it be done in ten days?

MR. NORVELL: I say if we can't agree.

THE COURT: I will be in Nashville Thursday, I am going to get through at Winchester Wednesday and I will be in Nashville Thursday.

MR. STOKES: I understand the only order entered today is an order for appraisal and all other matters are reserved?

THE COURT: Yes, I will do that.

MR. SIMS: Your Honor is taking under advisement the order of sale until an order of appraisal comes in?

THE COURT: Yes, all other matters are held in abeyance until the appraisal is made."

Said hearing was had at Monteagle during which the above quoted colloquy took place on a Saturday and on the Thursday next following the hearing was resumed in the courtroom at Nashville, Tennessee.

Subsequent to the hearing at Monteagle and before the resumption of the hearing in Nashville, a conference was had between Hon. Cecil Sims, representing a large bondholder, Lewis S. Pope, Lawrence Howard, representing the debtor, and Mr. Stanley Horn, one of the proposed directors for the corporation under its re-organization plan. No agreement was reached at said conference concerning the selection of appraisers. It is averred that attorneys for debtor were present at said conference not in a capacity as attorneys for Tennessee Publishing Company in the case of C. O. Carpenter, Receiver, etc., vs. Tennessee Publishing Company, the same being the equity receivership case pending in this Honorable Court, but were acting solely and alone in their capacity as attorneys for the debtor in the pending reorganization proceeding styled in the caption hereof. In fact, neither of the attorneys present for this debtor had been employed in said receivership proceeding, nor was Mr. Stanley Horn

present in any capacity for the Debtor except in the re-organization thereof.

Thereafter, and at the appointed time the hearing adjourned at Monteagle was resumed at Nashville, Tennessee. Upon said hearing the Court was apprised of the fact that the parties were unable to agree upon the selection of appraisers, and counsel for debtor suggested and insisted that three appraisers be appointed to value the properties and assets of debtor, but upon objection being made to the number of appraisers by attorney for one of the large bondholders, which objection was concurred in by attorney for another large bondholder, it was finally determined to select one appraiser. To be more specific, debtor alleges that upon the suggestion and insistence of one of debtor's attorneys that three appraisers be appointed, Honorable W. E. Norvell, attorney for one of the large bondholders, stated in open court, in substance, that he was of the opinion that one appraiser would be better than three appraisers. Thereupon, Honorable Cecil Sims, attorney for another large bondholder, stated in substance, that he was of the same opinion as expressed by Mr. Norvell; whereupon, Lewis S. Pope, one of the attorneys for debtor, stated to the Court that while the debtor preferred the appraisal to be made by three appraisers, nevertheless in order to prevent delay debtor was willing to accede to the demands of opposing counsel and agreed that said appraisal be made by one appraiser. The Court being advised that counsel were unable to agree upon the selection of an appraiser requested the parties to furnish him names of newspaper publishers or owners in order that they might be communicated with by the Court for the purpose of learning the names of persons or companies who could best make said appraisal. It is averred that pursuant to said agreement made in open court, that said agreement was adopted by the court, as is evidenced by the fact that one appraiser was appointed, and, while said appraisal was actully ordered in the receivership case of C. O. Carpenter, Receiver, etc., vs Tennessee Publishing Company, the Court stated that said appraisal would be used both in said equity receivership cause and in this re-organization proceeding.

After the Court had been furnished the names of certain publishers and/or owners, as he requested, counsel for certain of the bondholders and for the debtor, the Court wrote with communications received from newspaper publishers from whom information had been requested concerning a suitable appraiser. Said letter, or a copy thereof, received by one of debtor's attorneys, is filed as Exhibit "A" to this

petition. Two days later the Court addressed another letter to counsel for the parties giving further information received concerning the appointment of an appraiser. Said letter is made Exhibit "B" to this petition.

Thereafter, a conference was had between Hon. Cecil Sims, counsel for a large bondholder, Laurence B. Howard and A. H. Roberts, of counsel for debtor, whereas an agreement was reached to the effect that all proposed appraisers with the exception of three be eliminated and the Court was furnished the three names from which it was agreed an appraiser might be selected. This information was communicated to the Court in a letter of July 26, 1935, opposing counsel being furnished a copy thereof, and a copy of which is made and filed as Exhibit "C" hereto.

It is further averred that such information was also communicated by letter written by Hon. Cecil Sims to the Court.

Mr. Carmack, president of debtor, was not present at said conference, but obtained information on the next day thereafter which made it inadvisable for the debtor to agree upon the selection of either of the three names theretofore submitted, and accordingly a telegram was sent to the Court on the next day after said conference, which telegram is as follows:

"Nashville, Tennessee,
July 27, 1935.

Judge John J. Gore,
Cookeville, Tennessee.

Information just received makes impossible agreement upon any of three names in Sims letter July twenty-six.

L. B. HOWARD."

The information mentioned in said telegram as just having been received was conveyed to the Court in a letter of July 27, a copy of which is filed as Exhibit "D" hereto.

Thereafter, the Court addressed a letter to Messrs. Sims, Norvell, Roberts & Roberts, under date of July 29, 1935, discussing the factors which the Court suggested should enter into the appraisal. A copy of said letter is made and filed as Exhibit "E" hereto.

In accordance with the foregoing understanding and agreement the Court appointed American Appraisal Company to appraise the assets and properties of debtor. This appointment of the one appraiser was not objected to and has not been objected to by bondholders or by anyone else con-

nected with this proceeding. It is further averred that subsequent to the appointment of American Appraisal Company as appraiser debtor prepared a petition seeking to have an appraisal made, not only of the property and assets of the debtor, but also of the alleged outstanding bonds against the property of debtor, and presented said petition to the Court at Cookeville, Tennessee, for filing. The filing of said petition was strenuously objected to by Hon. Cecil Sims, Hon. Harley Fowler, and Hon. W. E. Norvell. The objection of the attorneys for the bondholders and of Mr. Fowler, attorney for plaintiff in the receivership proceedings hereinbefore mentioned, was chiefly that an appraisal of the properties was then in progress and that the value of the bonds would be fixed and determined by the fixing of the value of the property included in the report. This view was concurred in by the Court and debtor was refused permission to file said petition, the Court stating, in substance, that the bonds could not be worth more than the property which secured their payment, and that it would serve no useful purpose to incur the additional expense at that time of ordering an appraisal of said alleged bonds, and that the same should await the coming in of the report of the appraiser.

On August 8, 1935, the Court addressed a letter to Lewis S. Pope, one of debtor's attorneys, concerning the hearing of two motions sought to be filed by debtor, one with reference to the appraisal of the property, and the other seeking to have a question relating to the constitutionality of Section 77-B disposed of. Said letter under date of August 8, 1935, is filed as Exhibit "F" hereto.

Said letter, Exhibit "F," was replied to by the addressee, and thereafter and on August 14, 1935, the Court wrote to Hon. Lit J. Pardue, Receiver of debtor, sending Lewis S. Pope a copy of said letter, which copy is made and filed as Exhibit "G" hereto.

Thereafter and on September 20, 1935, the report of the appraiser was filed wherein the physical plant properties and intangible assets were appraised at the sum of $295,585.18, all is shown by said report of the appraiser. It is averred that said report was filed in the receivership cause of C. O. Carpenter, Receiver, etc., vs. Tennessee Publishing Company, pending in this court.

Following the filing of said report of the appraiser in the receivership cause as aforesaid, attorneys for debtor prepared an order directing the filing of the report in this proceeding

in accordance with the previous understanding as hereinbefore set out. Upon said order being submitted to the Court the same was signed for entry by the Court but with direction to counsel for debtor to submit said order to opposing counsel in Nashville, Tennessee, before having the order entered by the Clerk. Upon presentation of said order to Hon. Cecil Sims and Hon. W. E. Norvell, attorneys for certain bondholders, said attorneys refused to sign same, and Mr. Norvell wrote a letter to the clerk of the court at Nashville, sending copies to the court and certain counsel, requesting that it be not entered until after they could be heard in opposition to its entry. Said letter is filed as Exhibit "H" hereto.

It is further alleged that in view of the foregoing facts, and particularly in view of the distinct agreement and understanding, and the subsequent course of dealings between all parties, the objecting creditors, (bondholders) are now estopped to insist that said appraisal was not made for all purposes, and that same should not be used in this proceeding to the same extent as in the aforesaid receivership cause. It is further alleged that if counsel for said objecting bondholders should be sustained in their present insistence that another appraisal will be necessary, that such would entail great expense and delay.

It is further averred that debtor is entitled to have said report of the appraiser filed in this proceeding and treated as an appraisal made pursuant to and in compliance with Section 77-B of the Bankruptcy Act.

PREMISES CONSIDERED, DEBTOR PRAYS:

That it be permitted to file this petition and that opportunity be given those parties adversely interested to make such defense hereto as may be proper, but said parties are expressly excused from answering under oath or seal, that being waived;

That the report of the appraiser filed in the receivership cause mentioned in the body of this petition, and which has been marked filed in this proceeding be treated in all respects

as having been made under Section 77-B of the Bankruptcy Act; and

For full and general relief.

WHITE & HOWARD
LEWIS S. POPE
ROBERTS & ROBERTS
Attorneys for Debtor.

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Personally appeared before me, in and for said County and State Lewis S. Pope, Lawrence B. Howard, A. H. Roberts and A. H. Roberts, Jr., and being duly sworn make oath that they are attorneys for debtor herein, are familiar with the facts set out in the body of this petition, and that the same are true in substance and in fact.

A. H. ROBERTS
A. H. ROBERTS, JR.
LAURENCE B. HOWARD
LEWIS S. POPE

Subscribed and sworn to before me on this October 11, 1935.

(SEAL) E. L. DUDNEY, Clerk.
By F. G. SELTER, D. C.

Exhibits To Debtor's Petition For Filing Of Appraisal

EXHIBIT "A"

Honorable W. E. Norvell, Jr. July 22, 1935.
Nichol Building,
Honrorable Cecil Sims,
American Trust Building,
and

Re: C. O. Carpenter, vs.
Tennessee Publishing Company

Roberts & Roberts,
American Trust Building,
Nashville, Tennessee.
Gentlemen:

On last Thursday, I wrote a number of letters with a view of contacting someone whom I might employ to appraise the property of the Tennessee Publishing Company covered by the mortgage in this case.

Among others, I wrote Mr. Clark Howell, President, Atlanta Constitution, requesting that he suggest some

competent appraiser, and today I am in receipt of a letter from Mr. Howell, in which he states, some other things: "At any rate, I refer you to the firm of Palmer, Suter & Palmer, 350 Madison Avenue, New York, N. Y. This firm has had more experience in the matter of newspaper appraisals than any other firm in America. We have been dealing with them for a long time, and only a few years ago they made a complete appraisal of the Constitution. * * * I unhestatingly recommend this firm to you and I know of no other firm in the country who can do the job as well as they can, nor in which you can place more reliance."

Attached to Mr. Howell's letter, was a statement furnished by Palmer, Suter & Palmer, in which it is stated that "During recent years we have been retained in the valuation or sale (or both) of such important newspaper properties as" and then follows a list of fifty-five newspapers in the states of New York, Texas, Georgia, Alabama, Massachusetts, Pennsylvania, South Carolina, Illinois, Ohio, Michigan, Minnesota, West Virginia, California, Missouri, Otawa, Ontario, Vancouver, British Columbia and Winnipeg, Manitoba.

I am also in receipt of a letter from Mr. Wm. Rule, Jr., Knoxville, Tennessee, under date of July 20, in which he states that his services will be available at any time "after the latter part of the coming week."

I am also in receipt of a letter from Mr. Walter C. Johnson, Vice-President and General Manager of the Chattanooga News, in which he states it is impossible for him to do the work, and suggests that the appraisal "might well be made by some person or concern like Mr. Samuel P. Weston, who makes a business of appraisals of daily newspapers," but he does not give the address of Mr. Weston.

I am also in receipt of a letter from Mr. Emanuel Levy, Vice-President and General Manager of the Courier-Journal and Louisville Times, Louisville, Kentucky, who declines to do the work for us.

I am in receipt of a letter from Mr. S. N. Harrison, 407 Foster Street, Nashville, who, you will recall appeared before the Court on last Thursday, hence you know him. I also have a letter under date of July 19, signed by Mr. J. C. Thomas, written on the stationery of "The Dixie Electrotype Company, Nashville, Tennessee," recom-

mending Mr. Harrison as being very thorough in this particular line of business, and stating he had "made a number of appraisals for our company."

It is impossible for me to write all attorneys and parties interested, and believing that you gentlemen represent the divergent interests, I take it that this communication to you will be satisfactory. But, I would be glad if you will submit this letter to your clients and to other lawyers, interested in the case. I earnestly solicit your co-operation, and desire a thorough and fair appraisal at the earliest practicable moment, and if it be possible, for you gentlemen to assist me by agreeing upon an appraiser, it will be a personal favor.

Very truly yours,
JOHN J. GORE (Signed)

P. S. A later letter, from Mr. Don S. Elias, of the Ashville Citizen Times, gives the address of Mr. Weston referred to as located in New York, at the Graybar Building, and I have addressed a communication to him as of this date.

EXHIBIT "B"

Honorable W. E. Norvell, Jr., July 24, 1935.
Nichol Building,
Honorable Cecil Sims,
American Trust Building,
Re: Tennessee Publishing Co.
Roberts & Roberts,
American Trust Building,
Nashville, Tennessee.
Gentlemen:

I am in receipt of a letter under date of July 22, from Honorable Clark Howell, President and Editor of the Atlanta Constitution, recommending Mr. T. W. Branch, recently of Nashville, but now of Atlanta, as being competent to appraise the Tennesseean plant. Mr. Howell says that Mr. Branch made an audit of the Constitution some twelve or fifteen years ago, and that his work was entirely satisfactory.

I am also in receipt of a letter from Mr. James K. Parkes, of Foster, Parkes Company, Nashville, in which

he says that Mr. S. N. Harrison, of Nashville, has done appraisal work for them for a number of years, and "We think him very capable;" and also that Mr. Harrison has had wide experience in appraising newspaper plants; that he is an expert in appraising physical property of printing plants.

I also have a letter from Mr. E. A. Bergstorm, President of the Williams Printing Company, of Nashville, in which he says that Mr. Harrison made an appraisal of the physical equipment of their plant last January, and that they consider him to be a capable appraiser.

Respectfully,
JOHN J. GORE (Signed)

EXHIBIT "C"

Judge John J. Gore, July 26, 1935.
Cookeville, Tenn.
Dear Judge:

Re: Tennessee Publishing Company.

At a conference of the counsel interested in the appraisal of the properties of this corporation, it was agreed among us that three names, Mr. Aubrey Harwell of Birmingham, Kelly-Smith Co. of New York, and Samuel P. Weston of New York, are unobjectionable to us, in that we know nothing whatever about them. Some objection has been urged to all the other names contained in your letter to us, and hence the other persons named were eliminated, so far as we are concerned. In other words, we make no recommendation whatever as to the three names above mentioned, for want of knowledge regarding them.

Yours very truly,
ROBERTS & ROBERTS.

Copies to:
Mr. Sims,
Mr. Norvell

EXHIBIT "D"

Judge John J. Gore, July 27, 1935.
Cookeville, Tenn.
Dear Judge: Re: Tennessee Publishing Company

Mr. Carmack has just come in our office and states that he has been in the office of Kelly-Smith Company

of New York and has some knowledge of them, that they are strictly advertisers and not appraisers, and he does not think they are proper and suitable persons to be appointed to appraise this property.

Mr. Carmack also knows of Mr. Weston, who he says is a broker and not an appraiser.

Mr. Carmack says at this time he does not know Mr. Harwell of Birmingham, but that he is now making an investigation to ascertain who and what he is.

Copy of this letter is sent to Messrs. Sims and Norvell.

Yours very truly,
ROBERTS & ROBERTS.

AHR/MM

EXHIBIT "E" TO PETITION

Roberts & Roberts, July 29, 1935.
American Trust Building,
Honorable W. E. Norvell, Jr.,
Harr-- Nichol Building
and Re: Carpenter vs. Tennessee Publishing Company

Honorable Cecil Sims,
American Trust Building,
Nashville, Tennessee.

Gentlemen:

I am in receipt of a letter from a person who claims to be competent to appraise the property of the Tennessee Publishing Company, in which he says, among other things, that he will do the work for $1500; that "We will determine the fair value of the assets in the light of existing conditions, and in arriving at such fair value, the following factors will be given consideration:

Machinery and Equipment:

Cost of reproduction, utility, depreciation resulting from wear and tear, obsolescence and activity.

Newspaper Files, Library and Morgue:

Similar to above.

Circulation and Franchises:

To a profitable going concern these would be included as a part of good will. To a non-profitable concern

the value, (if any) would be based upon consideration of comparable transfers of like facilities throughout the country and with recognition of the local situation.

Good Will:

Balance sheets would be reconstructed upon the basis of an analysis of income and operating expenses for the purpose of forecasting future potentialities and after determining a fair return on the investment the surplus earnings would be capitalized to arrive at the good will, if any.

Our report would be compiled in comprehensive form containing a detailed itemization of major units of equipment and grouping of minor classifications, and explanatory details with reference to the treatment of the special items such as circulation, morgue, good will, etc."

And he also states that he is in position to take up the work promptly and will make and deliver his report in approximately three or four weeks thereafter.

The purpose of this letter is to know whether the foregoing items include all that is necessary to be considered and reported on by the appraiser.

I will thank you for a prompt reply.

Respectfully,
(Signed) JOHN J. GORE.

EXHIBIT "F"

August 8, 1935.

Honorable Lewis Pope,
514 Independent Life Building,
Nashville, Tennessee.

My dear Mr. Pope:

I am in receipt of your letter of yesterday, in which you state that "the attorneys representing the Tennessee Publishing Company have decided to file two motions; one with reference to the appraisal of the property and the other asking your Honor to dispose of the question of the constitutionality of Section 77B", and you enclose copies of the proposed motions, and state that you desire to have an early hearing on these motions,

and ask if I will indicate what date I can hear the motions, etc.

I do not know when I can hear these motions; I have cases set for trial every day during the remainder of this and next week except Saturday; these are jury cases and oral testimony will be offered, the juries are summoned and in attendance every day, and I suppose witnesses have been summoned also, so, you see it would be impossible to hear your motions on any day except Saturday. I cannot think when I have had a Saturday off.

I will be in Knoxville on the trial of a case for a week, beginning August 19; will resume the trial of my docket here on the 26th, and will conclude on the 27th or 28th, so, I might hear your motions on August 29, 30, or 31st.

I have read the copies of your proposed motions, one of which requests the "Court to dispose of the questions raised herein attacking and concerning the constitutionality of Section 77B of the General Bankruptcy Act, and for an order sustaining and upholding the constitutionality of said amendment to said Act." You know Mr. Sims filed a motion at a former hearing attacking the the constitutionality of Section 77B. I suppose that is the motion upon which you wish to invoke the action of the Court. I understand Mr. Sims is in Florida, and I have no information as to when he will return. I would not want to pass upon the constitutionality of any Act of Congress until I had had an opportunity to consider it, so I suggest that you submit to me a brief, giving Mr. Sims a copy and I will then request him to furnish a brief, giving you a copy, and I will consider the matter at the very first opportunity upon this question oral argument would, no doubt, be helpful, but I consider written briefs indispensible.

In regard to the other motion you desire to make pertaining to what should be embraced in the appraisal of the property: I would call your attention to the fact that before I employed an appraiser, and in fact, on July 29, I addressed a joint letter to Roberts & Roberts, whom I understood represented the debtor, or, at least parties instrumental in submitting the plan of reorganization, to Mr. W. E. Norvell, Jr., and Mr. Cecil Sims, whom I understood represented certain bondholders affected by the plan, in which I stated that I was in re-

ceipt of a letter from a person who claimed to be a competent to appraise the property, and that in his proposition of appraisal, he would consider certain factors, setting out the factors to be considered; in that letter I stated "The purpose of this letter is to know whether the foregoing items include all that is necessary to be considered and reported on by the appraisers." I received replies to that letter from Messers. Norvell and Sims, but did not receive a reply from Roberts & Roberts, or anyone associated with them in the case. I therefore, naturally concluded that the factors mentioned in the proposal were satisfactory to your client and to all persons interested in the plan of reorganization submitted.

I am informed that the mortgage covers all the property of the debtor, except such as was consumable in its use. I have never seen the mortgage. If it does not include all the property of the debtor, and there is any other property which should be included in the appraisal, I would be glad if you will call it to my attention, and I will then consider amending the contract with the appraiser, in order to have it embraced in his report.

I will do this upon request, which will save you then expense and trouble of a formal motion and a trip to Cookeville to argue it.

I want to cooperate with all parties concerned to the end that the property may be disposed of to the best advantage, in the most economical and expeditious manner.

Respectfully,
JOHN I. GORE (Signed)

EXHIBIT "G"

Honorable Lit J. Pardue, August 14, 1935.
Receiver, Tennessean,
Nashville, Tennessee.
Dear Mr. Pardue:

Enclosed is copy of a letter dated August 14, which I have just received from Honorable Lewis S. Pope, in Re: Tennesseean Publishing Company, debtor.

Please note the last paragraph on page 1, of his letter, where he says among other things: * * * I am informed that there is considerable property outside of the mort-

gage. For example, it is my information that all bills receivable are not included in the mortgage."

I understood that the property not covered by the mortgage was inconsequential. I will thank you to investigate this matter, and answer that portion of Mr. Pope's letter for me, sending me copy of your letter to him.

I believe, also, that all the property should be appraised, segragating that which is not covered by the mortgage.

You know Mr. Dover stated to us that he would give us as many copies of his audit as we desired: I believe it would be a good idea to have as many as a dozen or more copies, as prospective bidders might want to inspect it, and it would be very handy if we had them to submit if requested.

I am sending copy of this letter to Mr. Pope.

Respectfully,

August 14, 1935.

Mr. Lewis S. Pope,
514 Independent Life Building,
Nashville, Tennessee.

Dear Mr. Pope:

Enclosed is copy of letter I have just written to Mr. Pardue, which is self-explanatory.

Respectfully,
JOHN J. GORE (Signed)

EXHIBIT "H"

September 30, 1935.

Honorable E L. Dudney, Clerk,
United States District Court,
Nashville, Tennessee.

Dear Sir:

Re: Tennessee Publishing Company, Debtor—In Proceedings for the Reorganization of a Corporation. No. 17141.

Mr. Sims has just informed me that he had today learned from Mr. Pardue, the Receiver in the case of Carpenter, Receiver vs. Tennessee Publishing Company, that Mr. Pardue had a copy of a letter Judge Gore had

written Mr. Lewis Pope with reference to Judge Gore signing a decree for entry in the 77B case upon opposing counsel approving it, meaning, I suppose, Mr. Sims and myself as we are local attorneys representing bondholders. Mr. Sims got a copy of the proposed order from Governor Roberts, and same provides for a filing of the appraisal in the 77B case as of September 20, 1935, and makes recitals as to agreements, etc., that we do not recall.

I cannot approve this order and understand from Mr. Sims that he cannot either. So far as we know, the order has not been submitted to Mr. Waller or to Mr. Fowler or to Mr. Levy, who appeared for other bondholders.

Since we understand the Judge only intended that this order should be entered after our approval, please do **not** enter it if presented to you, as we desire to be heard before the order is entered. I gather from Mr. Sims' information as to Judge Gore's letter that the Judge regarded this order as more or less a formal one. Mr. Sims and I do not so regard it, and do not feel that the debtor is entitled to have this order entered, and we would like to call Judge Gore's attention to our position before he finally passes on it.

In order to save two communications, I am sending a copy of this letter to Judge Gore, and may say that Mr. Sims is in my office and concurs with what I am writing.

Yours very truly,

WEN/m

CC Hon. John J. Gore,
Gov. A. H. Roberts
Mr. Cecil Sims

ANSWER OF RECEIVERS OF MINNESOTA & ONTARIO PAPER CO.

(Filed October 14, 1935)

R H. M. Robinson and C. T. Jaffray, Receivers of the Minnesota & Ontario Paper Company, a corporation under laws of Maine, with its principal office in Minneapolis, Minnesota, acting as such Receivers under decree of the District Court of the United States, for the District of Minnesota, Fourth Division, now come, and on behalf of the said Minnesota & Ontario Paper Company, confirm the position taken by their counsel in open court, at the hearing of this matter in Monteagle, Tennessee, on the 13th day of July, 1935, and respectfully state and show to the Court:

1. That Minnesota & Ontario Paper Company has a claim, which has been allowed by the Special Master, against the Tennessee Publishing Company, the sum of $121,494.00.

2. That they are unwilling to consent to, or participate in, the plan of re-organization of Tennessee Publishing Company, which has been submitted to the Court, not deeming the same practicable.

3. That they believe that the receivership should be ended, and the property, which is subject to sale, should now be sold under the orders of the Court.

CHARLES C. TRABUE,
THOMAS H. MALONE,
Attorneys for Receivers.

ORDER ALLOWING FILING OF PETITION

(Entered Oct. 14, 1935)

In this cause, debtor, Tennessee Publishing Company presented and was given leave to file its petition explanatory of the facts and circumstances surrounding the filing of its petition for reorganization, and all parties hereto adversely interested are allowed ten days hereafter in which to file answer thereto.

This the 14th day of October, 1935.

GORE, Judge.

EXPLANATORY PETITION OF DEBTOR
(Filed October 14, 1935)

To The Honorable John J. Gore, Judge:

Comes the debtor, Tennessee Publishing Company, a Tennessee corporation, not waiving but relying upon its motion to strike the so-called amended and supplemental answer filed herein by American National Bank on October 10, 1935, but fully relying thereon pending the argument of the motion of alleged bondholders of debtor corporation to dismiss the petition filed by debtor on June 6, 1935, for want of good faith, and presents this pleading by way of more fully setting forth the facts surrounding the filing of said petition of June 6, 1935, leading up thereto, and the objects and purposes of debtor and its officers and stockholders with respect to the conduct and operation of debtor corporation under the re-organization plan proposed, and that the Court may further understand the matters leading up to, included in and proposed purposes of the debtor in its plan of re-organization, and respectfully show to the Court:

I

That E. W. Carmack, Jr., is now the President of debtor corporation and the holder in his own name of all the common stock of the debtor corporation, although, in fact, he had made arrangements with certain financial interests by which other persons interested with debtor corporation and with said Carmack in the re-organization of the debtor corporation, and for the purpose of securing new money for the purpose of providing a sufficient operating fund or capital with which to operate debtor corporation after its re-organization, and also for the purpose of infusing new blood into the life of debtor corporation, and for the purpose of raising funds sufficient to comply with such orders as this Court may make with respect to the consummation of the re-organization plan submitted.

That is to say, that by the arrangement above mentioned under which other persons now have a valid and subsisting interest in said common stock standing in the name of E. W. Carmack, Jr., under which arrangement experienced and capable business men and newspaper men are to become actively connected with the operation of debtor corporation, as soon as the re-organization plan is approved by the Court, and are to furnish funds both for the purpose of complying with the orders of the Court in connection with the reorgani-

zation plan, and also funds sufficient adequately and properly to carry on the business of debtor corporation by the publication of a daily newspaper or newspapers in Nashville.

II

That at and prior to the date of the death of Senator E. W. Carmack, father of E. W. Carmack, Jr., who is now President of debtor corporation, Senator Carmack was Editor in Chief of the Nashville Tennessean, the paper then and now published by debtor corporation, and was at the same time the owner of some of its stock. Numerous friends and relatives of Senator Carmack also owned stock in debtor corporation at that time, and were caused to invest in said stock by Senator Carmack and because of his connection with said paper. After his death on November 9, 1908, this stock was held by his widow, the mother of E. W. Carmack, Jr., for some time and was later surrendered and preferred stock was issued to her to take up the common stock which had been held by her husband, Senator Carmack. This preferred stock was issued to the widow of Senator Carmack, and mother of E. W. Carmack, Jr., and so remained until about ten or eleven years ago when, for satisfactory reasons to said widow she surrendered her stock upon condition that such preferred stock be issued to and held by her first cousin, Frank D. Lander, an experienced newspaper man, who was in better position to safeguard the rights of widow than she was. And said preferred stock, in the amount of $15,000.00, which was really the property of the widow and E. W. Carmack, Jr., as the only distributees of the estate of Senator E. W. Carmack, deceased, who left only one child, E. W. Carmack, Jr. The affidavit of Frank D. Lander in support of this statement is filed herewith as Exhibit "A" hereto, and part hereof, as fully as if set out at length herein.

For a great many years neither the widow of Senator Carmack nor his son, nor anyone else for them, received any dividends whatever on said preferred stock in debtor corporation, although they were entitled to such dividends over a period of many years, as is verily believed.

III

More than a year before the filing of the receivership bill in this Court by C. O. Carpenter, Receiver, in March 1933, E. W. Carmack, Jr., began to devise plans to acquire a further interest in the properties of debtor corporation to the end that he might become Editor in Chief of the papers published by debtor, which position he very much desired, not

only because it was a position held by his father, but because he had good reasons to believe that said papers could be made a paying proposition by proper and economical management. He continued his efforts to secure a further interest in said property, having at all times in mind the fixed purpose of becoming Editor of the paper and to establish it as a profitable business enterprise and at the same time protect its creditors and stockholders and afford an opportunity to render a service to the people of the State who had signally honored his father. He made many efforts to realize on the interests held by himself and his mother, and these efforts continued almost continuously until they culminated in the acquisition of all the common stock held by Colonel Luke Lea and others. During these negotiations E. W. Carmack, Jr., made several trips to New York to confer with financiers interested in financing such a proposition, and finally after the receivership he sought out Mr. Paul Davis, President of the American National Bank, and in the presence of a reputable attorney of Nashville, Tennessee, a member of a firm now representing one of the alleged bondholders of debtor corporation, discussed this question with Mr. Davis. In that conversation the latter stated, in substance, that he was not interested in discussing the subject about which Mr. Carmack approached him relative to the Tennessean, that he, or interests whom he represented, preferred to keep such interests as they had in the paper, and would, to use Mr. Davis' exact expression to the best of Mr. Carmack's recollection, "We will feed it $100,000.00, if necessary,"—meaning, as Mr. Carmack understood it, that Mr. Davis and associated interests would spend $100,000.00 in supporting the Nashville Tennessean rather than entertain any suggestions for sale or re-organization of same which Mr. Carmack might propose.

IV

These efforts of E. W. Carmack, Jr., were continued, in one form or another, with the same objects in view, as above shown, until the spring of 1935, when he began negotiations with certain representatives of Colonel Luke Lea for the acquisition of the common stock of debtor corporation held by said Luke Lea, which negotiations continued over a period of time until they were consummated early in June 1935, immediately prior to the filing of the petition of June 6, 1935. On June 5, 1935, a meeting of the stockholders of debtor corporation was held, when Luke Lea, Jr., then the holder of the common stock of his father, Colonel Lea, in furtherance of the trade which had been made by said Carmack,

voted his father's stock under a power of attorney authorizing him so to do, at which meeting E. W. Carmack, Jr., was elected President of debtor corporation. He could not get possession of the stock books of debtor corporation, which were presumably in the hands of the Receiver of this court in the case of C. O. Carpenter, Receiver, v. Tennessee Publishing Co., and was reduced to the necessity of getting an order from this Court to get permission to transfer the stock from the name of Colonel Lea and others to that of E. W. Carmack, Jr., which was finally consummated early in July, 1935, a few days after the filing of the petition. At the meeting of June 5, 1935, a Board of Directors was first elected by the stockholders present and this Board of Directors formally elected the officers of the corporation, including E. W. Carmack, Jr., President, and both in the meeting of the stockholders and in the meeting of the Directors, action was taken authorizing and directing the filing of the petition for the re-organization of debtor corporation which was sought by the petition filed on June 6, 1935.

V

E. W. Carmack, Jr., is a newspaper man by education, training and experience. He is now the Editor and Manager of a daily newspaper published at Murfreesboro, Tenn., over which he assumed the management over two years ago, at a time when it was losing money heavily, and notwithstanding the depression he has converted said paper into a prosperous and profitable business enterprise which is now making money. Prior to that time he had had considerable newspaper experience. It is now believed by his associates that he has the capacity to make the Tennessean papers likewise profitable to the stockholders under the re-organization plan, and thereby improve the condition of its creditors.

VI

Debtor further states that E. W. Carmack, Jr., acquired the common stock of debtor corporation from Colonel Luke Lea for a valuable consideration agreed upon between E. W. Carmack, Jr., and representatives of Colonel Luke Lea.

VII

As a further evidence of the good faith of debtor corporation and of its officers and those interested in the re-organization plan proposed by it, it is respectfully stated that debtor through its counsel has been very diligent in its efforts to comply with section 77-B, and with the orders of

the court in this case, and to expedite the hearing on its petition for re-organization, and has at all times and is now ready, willing and able to comply with any reasonable orders of the Court with respect to carrying out its said proposed plan of re-organization and the payment of the fair and reasonable appraised value of the properties of the debtor as same may be adjudicated by the Court.

VIII

Since the properties claimed by alleged bondholders to be covered by their said bonds have been appraised by order of Your Honor, and certain properties not covered by the alleged deed of trust to secure bondholders have likewise been appraised under the orders of the Court, debtor now stands ready, willing and able to take said properties at said appraised value and pay for same in cash within a reasonable time under the orders of the Court in this case.

By way of further explanation, there are other properties now owned by debtor corporation, such as accounts receivable, etc., which are not necessary to the operation of its newspaper, which properties debtor stands ready, willing and able to take at a fair and reasonable value, or same may be excluded from the re-organization plan if deemed by the Court to be to the best interests of all parties concerned.

PREMISES CONSIDERED, DEBTOR PRAYS:

That it be permitted to file this pleading as explanatory of the object and purpose of the filing and presentation of its re-organization plan herein and that it be permitted to effect a re-organization of said corporation in accordance with the plan and amended plan heretofore proposed, and for full and general relief.

LEWIS S. POPE
WHITE & HOWARD
ROBERTS & ROBERTS,
Attorneys for Debtor.

AFFIDAVITS TO EXPLANATORY PETITION

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Comes E. W. Carmack, Jr., who makes oath in due form of law that he is President of debtor corporation, Tennessee Publishing Company, and that the facts stated in the foregoing pleading as upon knowledge are true, and those stated upon advice, information and belief, he verily believes to be true.

E. W. CARMACK, JR.

Subscribed and sworn to before me on this October 14, 1935.

(SEAL) MAYVER MOORE,
Notary Public.

My Commission expires May 10, 1938.

AFFIDAVIT OF FRANK D. LANDER
(Filed October 14, 1935)

Comes Frank D. Lander who makes oath in due form of law that he is a first cousin to the widow of Senator E. W. Carmack, deceased, who is the mother of E. W. Carmack, Jr., President of Tennessee Publishing Company. He further states that some years ago he agreed to act as Trustee for Mrs. E. W. Carmack and her son E. W. Carmack, Jr., in the matter of having issued to him $15,000.00 of the preferred stock of Tennessee Publishing Company, which he now holds as Trustee for Mrs. Carmack and her son, and has held for several years as Trustee for them, and not in his own right.

FRANK D. LANDER.

Subscribed and sworn to before me on this October 14, 1935.

(SEAL) MARY C. MAMMARELLI,
Notary Public.

My Commission expires 14th day of July, 1936.

SUPPLEMENTAL ANSWER OF C. O. CARPENTER, RECEIVER OF THE HOLSTON-UNION NATIONAL BANK

(Filed October 14, 1935)

Since the filing of the answer herein of C. O. Carpenter, Receiver of the Holston-Union National Bank the petitioner has filed a plan of re-organization and also a supplemental plan to which reference is here made. It is denied that the plan as thus presented could or should be adopted, for the reasons following:

1. In the equity cause of C. O. Carpenter, Receiver vs. Tennessee Publishing Company, referred to in the pleadings, Paul M. Davis, a citizen of Nashville, has offered to pay $400,000 for the assets of the Tennessee Publishing Company which are encumbered by the trust deed securing the bond issue, a part of which bonds is owned by respondent. It is proposed by said Paul M. Davis that a sale be made to him of said assets for said consideration, or else that a public sale of the property be had of the amount offered by him to be treated as an upset price, that is, a price at which the bidding could be started.

2. That none of the bondholders secured by said trust deed have accepted said plan but that all are opposed to it and accordingly the enforcement by the Court of this plan of reorganization upon the bondholders would be depriving this respondent and the other bondholders of property without due process of law, which action of the Court would be violative of the Fifth Amedment of the Constitution of the United States.

C. O. CARPENTER, Receiver of The Holston-Union National Bank.

By H. G. FOWLER, Attorney.

FOWLER & FOWLER, Solicitors.

Amended Plan Of Reorganization

Order Allowing American National Bank To File Supplemental Answer

AMENDED PLAN OF REORGANIZATION

(Filed October 15, 1935)

Comes the Debtor, Tennessee Publishing Company, and amends its plan of reorganization as heretofore filed, as follows:

(1) The Debtor offers to pay in cash on such reasonable terms and conditions as the Court may fix, the entire amount of the appraised value of the property of the Debtor Corporation, as the same may judicially be determined by this Court or the appraised actual cash value of all valid interests, claims or liens on any of debtor's property when judicially determined. Said payment to be made into court or under such other arrangement as the Court may hereafter direct. Or if the Court so direct.

(2) The Debtor offers to pay in cash under the conditions and terms set out in paragraph (1) above, the appraised value of the property as judicially determined by this Court, covered in the recent appraisal of the American Appraisal Company and described therein as "Property covered by the mortgage and/or deed of trust," and to leave for liquidation in an manner deemed suitable by the Court the remaining property of the Tennessee Publishing Company.

(3) This amendment to the plan of reorganization heretofore filed in this cause shall, if the Court so order, supersede and subplant all provisions in any plans of reorganization heretofore submitted by the Debtor, insofar as said plans of reorganization may be in conflict herewith, but no further or otherwise.

TENNESSEE PUBLISHING CO.
By E. W. CARMACK, JR.,
President.

ORDER ALLOWING AMERICAN NATIONAL BANK TO FILE AMENDED AND SUPPLEMENTAL ANSWER

(Filed October 16, 1935)

For good cause shown and on motion of Cecil Sims, Attorney, American National Bank is granted leave to file an amended and supplemental answer and motion to dismiss

the petition, and it appearing to the court that such amended and supplemental answer and motion have heretofore been filed with the clerk on the ..... day of October, 1935, this order is entered nunc pro tunc and the motion made by the petitioner to strike said pleading is disallowed.

GORE, Judge.

ORDER UPON PETITION OF DEBTOR THAT COPY OF APPRAISAL BE FILED

(Entered Oct. 16, 1935)

This cause came on to be heard upon the petition of the debtor that a copy of the appraisal of the American Appraisal Company filed in the Receivership or General Creditors case of C. O. Carpenter, Receiver, vs. Tennessee Publishing Company, and that the bondholders be held estopped to except to, or question, said apprisal on the ground that there was only one appraiser appointed, instead of three, and the Court finding that W. E. Norvell, Jr., representing certain of the bondholders had urged and insisted in open court that there should be only one appraiser and Cecil Sims representing certain other bondholders, had made, or acquiesced in the same insistence..

It is ordered, adjudged and decreed that the said appraisal of the American Appraisal Company, heretofore filed in the said Receivership case shall be immediately filed by the Clerk in this cause by the manual filing of a copy or counterpart thereof and that the same shall be filed as the official appraisal in this case and that the bondholders are estopped to question or except to said appraisal on the ground that same should have been made by more than one appraiser.

Upon application of bondholders, represented by W. E. Norvell, Jr., and Cecil Sims, and for good cause shown it is further ordered that exceptions to the said report, other than any based on the fact that same was made by one appraiser instead of three, and any other proceedings looking toward the judicial establishment of value, may be filed at any time

prior to such date for the filing thereof as the Court may hereafter fix.

To the above report of said order made on the application of debtor, the bondholders except, and to the above portion of the order made on application of the bondholder the debtor excepts, the debtor excepts because the rules made governing the action of the Court in such matters provide how such exceptions may be made to the report, and there is no reason why said rules should not be enforced, and if the bondholders have exceptions they desire to file to the appraisal, they should do so within the time fixed by the Court.

This the 16th day of October, 1935.

GORE, Judge.

Approved as to form:

BASS, BERRY & SIMS
W. E. NORVELL, JR.
LEWIS S. POPE,
Attorneys for Debtor.

ROBERTS & ROBERTS, Sols.

EXCEPTIONS OF C. O. CARPENTER, RECEIVER OF THE HOLSTON-UNION NATIONAL BANK, TO THE ORDER ENTERED HEREIN ON OCTOBER 16, 1935, AUTHORIZING AN APPRAISAL OF THE AMERICAN APPRAISAL COMPANY TO BE FILED IN THIS CAUSE

(Filed October 19, 1935)

C. O. Carpenter, Receiver of the Holston-Union National Bank, of Knoxville, Tennessee, respectfully shows to the Court that he is the owner and holder of bonds in the principal amount of $28,000.00 of Tennessee Publishing Company secured by a trust deed creating a first lien upon the mortgaged property, and that he excepts to the order entered

herein on October 16, 1935, authorizing the filing herein of the appraisal made by the American Appraisal Company, upon the grounds following, to-wit:

1. Said appraisal was ordered to be made by this Court in a cause pending herein styled C. O. Carpenter, Receiver vs. Tennessee Publishing Company, being Cause No. 546 in Equity, and was not ordered to be made in this couse.

2. Said appraisal was not made by three disinterested appraisers, but instead was made by a corporation acting through its agent or agents, and accordingly is not such an appraisal as is contemplated be made under the provisions of Section 77B of the Bankruptcy Act.

3. C. O. Carpenter, Receiver, did not consent to the filing of said appraisal or a copy thereof in this cause; he did not agree that said appraisal would be considered as having been made in this cause; he did not agree that it should be treated as such an appraisal as was contemplated by Section 77B of the Bankruptcy Act; nor did he agree to the designation of one appraiser instead of three, as provided for by the Bankruptcy Act; and C. O. Carpenter, Receiver, has done nothing to estop him from asserting any and all objections to the entry of said order herein and to said appraisal and the filing thereof in this cause.

4. Said appraisal should not have been filed in this cause for the reason that the proceedings were opposed in good faith by a majority of all the bondholders, and were opposed in good faith by a majority of all of the general creditors, and it has accordingly at all times been apparent that a sufficient number of such bondholders and creditors would not join in said plan of reorganization to make it possible for the Court to adopt it.

5. No plan as contemplated by Section 77B of the Bankruptcy Act was offered by the debtor in this case and for that reason no appraisal should have been filed herein.

6. Inasmuch as the alleged plan of reorganization as proposed herein by the debtor was opposed in good faith by a majority of bondholders and a majority of general creditors, the acceptance by the Court of the plan of reorganization would have been depriving C. O. Carpenter, Receiver, and the other bondholders, of property without due process of law, which action of the Court would be violative of the Fifth Amendment of the Constitution of the United States and

the Court should so hold, and having so held the petition of the debtor should be dismissed without further proceedings with respect to the filing of an appraisal. In other words, the action of the debtor being violative of the provisions of the Constitution of the United States referred to, there is no need of going further.

C. O. CARPENTER, Receiver of The Holston-Union National Bank.
By H. G. FOWLER,

FOWLER & FOWLER — Attorney.
Solicitors.

EXCEPTIONS OF C. O. CARPENTER, RECEIVER OF THE HOLSTON-UNION NATIONAL BANK, TO THE APPRAISAL OF THE AMERICAN APPRAISAL COMPANY FILED IN THIS CAUSE ON OCTOBER 16, 1935

(Filed October 19, 1935)

C. O. Carpenter, Receiver of the Holston-Union National Bank, of Knoxville, Tennessee, respectfully shows to the Court that he is the owner and holder of $28,000.00 par value of bonds of the Tennessee Publishing Company secured by a trust deed creating a first lien upon the mortgaged property, and that he excepts to the appraisal of the American Appraisal Company filed in this cause on October 16, 1935, upon the following grounds, to-wit:

1. Said appraisal is erroneous in that it does not give sufficient value to the assets of the debtor. The assets of the debtor are worth more than is stated in the appraisal.

2. Said appraisal should be wholly disregarded by the Court for the reason that an offer of $400,000.00 for the mortgaged property and $40,000.00 for the unencumbered property has been made by Paul M. Davis, a reputable citizen of Da-

vidson County, Tennessee, which offer greatly exceeds in amount the value of the assets of the debtor as fixed in said appraisal. While said offer was made in the cause of C. O. Carpenter, Receiver vs. Tennessee Publishing Company, pending in this Court, wherein the assets of the Tennessee Publishing Company are being administered, yet it has been made known to the Court in this cause and a copy thereof exhibited to the amended answer of the American Trust Company. It is offered by said Paul M. Davis to start the biddings at the sums mentioned and it is shown to the Court that there are several other persons who have indicated a willingness to pay substantially more for the assets of the defendant company than offered by said Paul M. Davis.

3. The methods used by the appraiser and the elements taken into consideration in fixing the value of said assets were erroneous.

C. O. Carpenter, Receiver, is filing exceptions to the order authorizing said appraisals to be filed in this cause and by filing these exceptions to the appraisal he does not waive the exceptions made by him to the order authorizing the filing thereof herein, but at all times relies upon said exceptions.

C. O. CARPENTER, Receiver of The Holston-Union National Bank,

FOWLER & FOWLER
Solicitors.

By H. G. FOWLER,
Attorney.

EXCEPTIONS OF O. H. INGRAM TO ORDER AUTHORIZING APPRAISAL OF AMERICAN APPRAISING COMPANY TO BE FILED IN THIS CAUSE

(Filed October 23, 1935)

Comes O. H. Ingram, owner and holder of bonds in the principal amount of $60,000.00 of Tennessee Publishing Company, debtor herein, and excepts to the order authorizing the

filing in this cause of the appraisal made by the American Appraisal Company upon the following grounds, to-wit:

1. Said appraisal was not made by three disinterested appraisers and accordingly is not such an appraisal as is contemplated under the provisions of Section 77B of the Bankruptcy Act.

2. Said appraisal was not ordered to be made in this cause, but was made in the equity receivership proceeding styled C. O. Carpenter, Receiver, vs. Tennessee Publishing Company, No. 546 in Equity.

O. H. INGRAM,

By PITTS, McCONNICO, HATCHER & WALLER,
Attorneys.

ORDER FOR FILATION OF THIRD PLAN OF REORGANIZATION

(Entered October 23, 1935)

Comes the debtor, Tennessee Publishing Company, and presents to the Court a further or additional plan of reorganization, and asks leave to file same, which is granted, and same is this day filed.

To which action of the Court American National Bank, Paul M. Davis, O. H. Ingram, C. O. Carpenter, Receiver, Holston-Union National Bank, except, and Broadway Discount Corporation, Commerce Union Bank, pledgee, and W. G. Bush & Company, reserve the right to except.

This the 23rd day of October, 1935.

GORE, Judge.

O. K. for Entry:
BASS, BERRY, SIMS, Attorneys
W. E. NORVELL, JR.
PITTS, McCONNICO, HATCHER & WALLER
WHITE & HOWARD
ROBERTS & ROBERTS
LEWIS S. POPE,
For Debtor.

THIRD PLAN OF RE-ORGANIZATION

(Filed October 23, 1935)

Comes the debtor, not waiving, abandoning, or in any way reflecting upon the plan of re-organization heretofore offered in this cause, and which the Court held to have been filed in good faith, and a plan that appealed to the Court as feasible and workable; and that the debtor was able in the Court's opinion to carry out; and would have been pleased to have approved, except for the fact that it was the Court's opinion that the plan so submitted by the debtor, and if effected as provided therein, would violate substantive vested rights in the property of the secured creditors herein, on account of the fact that two-thirds thereof had not approved the plan; and that, on that account, the Court thought that it violated the Fifth Amendment of the Constitution of the United States.

Now, not waving any of the rights that the debtor has of appeal, or otherwise herein, from the decision of the Court, as above stated; but, on the contrary, preserving all of debtor's rights with reference thereto.

However, the debtor being so anxious to bring about a reorganization of its affairs, and to stop the loss resulting from the operation of its affairs, as now being operated by a Receiver in another cause in this Court; and, if possible, seeking to comply with the Court's ruling with reference to the constitutional rights of the creditors herein, and especially the secured creditors; and, the Court having held, in its opinion, delivered on the 15th day of October, 1935, with reference to the plan of re-organization before the Court at that time, that, if the plan had provided for a retention by the debtor of its property, subject to the interest, claims or liens of the secured creditors, that, in the Court's opinion, would have been constitutional, and would have violated no rights of the secured creditors. Therefore, the debtor submits the following plan of reorganization:

I

The debtor will take over the operation of its affairs, the expense of operating the same, taking the property subject to all legal liens, to the full amount that the Court determines due the holders thereof. This applying to all property of debtor, which is included in the mortgage, to secure an outstanding bond issue. If the holders of the securities, so secured by said mortgage, are willing to accept eighty cents on the dollar of the face value of the bonds so held by them,

which would make a total of six hundred thousand dollars ($600,000.000) outstanding against the debtor and certain of its property, the debtor is willing to accept this amount as due, and retain its property, subject to this mortgage for that amount. The Court to fix a reasonable rate of interest for debtor to pay on said six hundred thousand dollars, in the hands of the secured creditors, until the same is matured and paid.

In the event that it should occur that certain ones of the holders of said securities or bonds, are willing to accept eighty cents on the dollar of the face value of their bonds, and certain other ones of the holders of said securities are not willing, in that event, the debtor is willing and proposes to fix the amount due those, who are willing to accept eighty cents on the dollar as the amount due them, the present mortgage to secure them, and to have the Court to determine the amount due the other holders of the outstanding bonds, who do not agree to take eighty cents on the dollar of the face value of their bonds; and, when the same is so judicially fixed, declared and adjudged by the Court, in each individual case of the holders, the debtor will retain its property, subject to said amount, so fixed by the Court to be due and secured by the mortgage on certain of its property. And, then, the plan provides for a reasonable rate of interest to be fixed by the Court to be paid to said bondholders, upon the amount so fixed as above provided.

The debtor suggests eighty cents, as above provided, because; in the first place, it is more than the bondholders, according to their own representatives' admission in Court, numerous times, could realize from a sale of the property, at this time. And, again, because certain of the bondholders have proposed, in open Court, to take eighty cents on the dollar for their bonds. And, again, because many of the outstanding bonds, as debtor is informed, have been bought by the present holders for much less than eighty cents on the dollar of the face value of the bonds. And, that an alleged recent purchaser of a large block of the bonds, only claims to have paid or agreed to pay eighty cents on the dollar of the face value of the bonds. But, if the holders are not willing to take this amount, as herein proposed, in that event, the debtor herein proposes to take its property subject to their liens to secure whatever amount the Court determines is due them.

II

There are certain properties and assets, belonging to the

debtor, which are not included in the mortgage, which naturally fit in with the operation of the debtor's business, and which probably are worth more as they are utilized in the operation of debtor's business than they would be to an individual purchaser; and, some suggestion having been made, in open Court, that they have a value of Forty Thousand Dollars ($40,000.00), debtor proposes to the Court, in addition to taking the property covered by the mortgage, subject to the lien, as provided in No. 1 hereto, that it will also take over the properties and assets of debtor, not included in the mortgage, and will pay into the Court, the sum of $40,000.00 cash therefor, to be paid in a reasonable time to be fixed by the Court.

III

It is further a part of the plan here submitted, that, if the secured creditors agree to take eighty cents on the dollar of the face value of their bonds; or, if they decline to accept said proposition, and the Court, as provided in this plan, determines the amount due on said bonds; that, after the amount is so determined, in either manner above suggested, and the owners thereof are determined, that, then, the time of payment be extended to some reasonable time fixed by the Court. And, what appears to the debtor as would be reasonable time, is the original time fixed in the face of the bonds and in the mortgage, as their dates of maturity; and that a reasonable rate of interest be fixed by the Court to be paid by the debtor from that time on.

Debtor proposes to further protect the holders of the bonds secured by the lien, by paying to them, after the amount and rate of interest is fixed by the Court, as above provided, the interest in advance for a period of three months; and to guarantee to the Court, and to the bondholders or secured creditors, that this interest will be paid, the sum of Ten Thousand Dollars ($10,000.00), to take care of the interest for the first three months on said bonds will be immediately paid into Court, or into some bank, according to the orders of the Court, to be used for the payment of the interest for the first three months after, the re-organization plan is adopted and the properties are returned to the debtor.

Debtor is perfectly willing for it to be a part of the plan, that is, the terms and conditions thereof, that, at any time, it does not pay the interest on said bonds in advance, for a period of ninety days, that the whole of said outstanding issue shall become due and collectible and be foreclosed under the

terms of the mortgage, as modified by the decree of the Court in this cause.

In addition to the above, debtor will arrange its own operating expenses to carry on the operation of the business of debtor, without calling upon the Court for any financial aid and assistance.

Debtor has made considerable investigation of the present operating expenses of its affairs, and of all of its business, and is thoroughly convinced that large savings can be had in carrying on and operating its business, and, in no way affect or lower the efficiency; and, that it can, and will, carry on its affairs, and publish the papers which are now being published, at a very material reduction in cost, and in such a manner as to return good profits, and make of it a gainful and profitable business.

IV

As soon as it is definitely determined how much will be paid the unsecured creditors from the proceeds of the sale of the proposed bond issue, as above set out, debtor will issue class "A" preferred stock in sufficient amounts, at the par value of $10.00 per share, to make up the deficit, if any shall exist between the total amount paid, or to be paid the unsecured creditors, and the sum of One Hundred Thousand Dollars ($100,000.00) to be divided ratably among such unsecured creditors. Such preferred stock, class "A," shall bear a fixed dividend of six per cent. (6%) per annum, and shall be non-cumulative and non-voting, and shall be callable at any dividend payment date, at par value thereof, plus earned dividends of the year in which called.

V

As soon as it is definitely determined how much will be paid the preferred stockholders from the proceeds of the sale of the proposed bond issue, as above set out, debtor will issue class "B" preferred stock in sufficient amounts, at the par value of One Dollar ($1.00) per share, to make up the deficit, if any shall exist, between the total amount paid, or to be paid the preferred stockholders, and the sum of Twenty-Five Thousand ($25,000.00) Dollars, to be divided ratably among such preferred stockholders upon the surrender of their present certificates.

Such preferred stock, Class "B", shall bear a fixed dividend of five per cent. (5%) per annum, and shall be non-cumulative

and non-voting, and shall be callable at any dividend payment date, at par value thereof, plus earned dividends of the year in which called.

VI

With reference to the amount due to the holders of the bonds in this case, that it, what is spoken of in the plan hereinbefore as face value, this, of course, contemplates that the Court fix the amount due each and all of the bondholders, in the event they do not agree to accept the plan at eighty cents on the dollar of the face value as it now stands.

The Debtor states to the Court that it is reliably informed; from information it has recently acquired, that, if the said outstanding bonds are valid at all to any amount, that it is impossible for the debtor to know, or to intelligently determine in any reliable manner as to what amount is or may be due thereon. As evidence of the debtor's inability to know or to find out what amounts are due on the bonds, if any, it is well to apprize the Court of certain facts relative to the bonds, which debtor has every reason to believe are reliable.

The debtor is informed, which it thinks to be accurate, that one block of the bonds to the amount of Sixty Thousand Dollars were purchased by the present holder thereof at twenty-five cents on the dollar, and that said purchase was made after the Receivership case was filed herein, and the insolvency of the debtor corporation was generally and well known and known to the purchaser of said block of bonds.

Also, within the last few days, Mr. Paul M. Davis claims to have bought or optioned Two Hundred and Fifty Thousand Dollars of the bonds, and only claims to have paid, or agreed to pay eighty cents on the dollar. Debtor is reliably informed that he only has an option on said bonds, and that he agreed to pay such an amount therefor, as was finally determined in this case that the property covered by the bonds was worth; but, not to exceed eighty cents on the dollar of the face value. Mr. Davis, who claims to be the holder of these bonds is thoroughly familiar with the happenings in this case, having been present at the different hearings under the petition in this very case.

Debtor is also reliably informed that a large block of T o Hundred and Ten Thousand Dollars, face value, of these bo.. is are held by the American National Bank and were taken over from the Fourth & First National Bank, of Nashville, under some plan of consolidation of the two banks, and that nothing like the full face value of the bonds was paid therefor, or

credits taken therefor; and, debtor is informed probably not to exceed thirty cents on the dollar of the face value of the bonds.

The debtor is further informed that all of the other outstanding bonds were bought at much less than face value, or only held as collateral to secure indebtedness, and that some of them have changed hands since the debtor was known to be insolvent, and since the Receivership case was filed in this cause.

Respectfully submitted,

TENNESSEE PUBLISHING CO.
By E. W. CARMACK, President.

RESPONSE OF O. H. INGRAM AND J. C. BRADFORD TO PROPOSED PLAN OF REORGANIZATION FILED OCTOBER 16, 1935

(Filed October 25, 1935)

Come O. H. Ingram and J. C. Bradford, and respectfully state to the Court as follows:

Respondents, O. H. Ingram and J. C. Bradford, have heretofore appeared in this cause and shown that they are the lawful owners and holders of $60,000.00 of principal amount of 6½% fifteen year debenture bonds, dated November 1, 1928, issued by Debtor, Tennessee Publishing Company, and numbered 566 to 625 inclusive; that said bonds have attached to them unpaid the semi-annual interest coupons maturing on May 1, 1933, and subsequent to that date; and that said bonds are a part of a series of bonds issued by Debtor as of November 1, 1928, and secured by a trust indenture of the same date recorded in Book 708, Page 69, in the Register's office for Davidson County, Tennessee.

Respondents acquired said bonds prior to the enactment of Section 77B of the Bankruptcy Act.

Respondent O. H. Ingram heretofore, to-wit, on or about the ..... day of April, 1934, filed his petition and claim in the equity receivership proceeding entitled C. O. Carpenter, Receiver, etc., vs. Tennessee Publishing Company, No. 546 in

Response Of O. H. Ingram And J. C. Bradford To Proposed Plan Of Reorganization

Equity, pending in this court, and in said petition alleged and showed that said bonds were in default as to payment of interest and otherwise, and that defendant Tennessee Publishing Company was insolvent, and prayed for a judgment and for a sale of the assets of said Tennessee Publishing Company, and the application of the proceeds to the satisfaction of his claim and judgment pro rata with other bondholders. Subsequently, to-wit, on or about the ..... day of May, 1934, respondents O. H. Ingram and J. C. Bradford filed their petition in said cause showing that said respondent J. C. Bradford had acquired a participation or interest in said bonds, and prayed that they jointly have the relief prayed in the petition previously filed by respondent O. H. Ingram.

Respondents now show that approximately eighteen months have elapsed since the filing of the petition and claim upon said bonds in said equity receivership proceeding whereing a sale of the properties was prayed, and that they have continuously since that time desired and sought a sale as they were entitled to under the provisions of said bonds and the trust indenture securing them.

Respondents state that the proposed plan of reorganization filed in this cause on October 16, 1935, seeks to take away and destroy their right to a sale of the properties of Debtor, and to permit Debtor to retaining said properties, notwithstanding its long continued defaults under said trust indenture.

Respondents do not consent to such plan, and will not consent to any plan whereby they are denied the right to a sale which they have been seeking for so long a time, and to which they were entitled under the express provisions of said trust indenture. And they aver that the adoption of such a plan would deprive them of valuable property rights contrary to the provisions of the Fifth Amendment to the Constitution of the United States.

Wherefore respondents pray that said plan of reorganization be declared ineffective, null, void and of no effect, and that the petition and all amendments thereto of Debtor in this cause, and all proceedings based or sought to be based thereon, be dismissed by the court.

PITTS, McCONNICO, HATCHER & WALLER,
Attorneys for respondents O. H. Ingram and J. C. Bradford.

STATE OF TENNESSEE
COUNTY OF DAVIDSON

J. C. Bradford, one of the respondents, makes oath and says

that he has read the foregoing Response and that the statements contained therein are true to the best of his knowledge, information and belief.

J. C. BRADFORD.

Sworn to and subscribed before me this 24th day of October, 1935.

RUTH EDWARDS,

(SEAL) Notary Public.

ANSWER OF RECEIVERS OF MINNESOTA & ONTARIO PAPER CO.

(Filed October 25, 1935)

R. H. M.Robinson and C. T. Jaffray, Receivers of the Minnesota & Ontario Paper Company, a corporation under laws of Maine, with its principal office in Minneapolis, Minnesota, acting as such Receivers under decree of the District Court of the United States, for the District of Minnesota, Fourth Division, now come, and on behalf of the said Minnesota & Ontario Paper Company, submit this their answer to the plan of reorganization filed herein on October 23rd, 1935, and respectfully show to the Court:

1. That Minnesota & Ontario Paper Company has an unsecured claim, which has been allowed by the Special Master against the Tennessee Publishing Company, in the sum of $121,494.00.

2. That they are unwilling to consent to or participate in the above mentioned plan of reorganization of Tennessee Publishing Company, submitted to the Court on October 23rd, being of opinion that the same is not practicable; that those offering the plan are not in position to raise the amount of money requisite for a new plant and sufficient working capital; and that the plan of reorganization offered is legally unsound.

3. That they believe that the receivership should be ended, and the property, which is subject to sale, should now be sold under the orders of the Court.

TRABUE, HUME & ARMISTEAD,
MALONE & WADE,
Attorneys for Receivers.

OFFER OF PAUL M. DAVIS, OF NASHVILLE, TENNESSEE, TO PURCHASE THE ASSETS OF TENNESSEE PUBLISHING COMPANY

Comes Paul M. Davis, of Nashville, Tennessee, leave of court being first had and obtained, and offers to purchase all of the assets of the defendant in this cause, Tennessee Publishing Company, now held by Lit J. Pardue, Receiver, for the consideration and upon the terms and conditions hereinafter set out.

The said Paul M. Davis offers to pay the sum of $400,000.00 for all of the assets of Tennessee Publishing Company included in and covered by the deed of trust from Tennessee Publishing Company to Liberty Central Trust Company and E. J. Miller, of St. Louis, Missouri, as Trustees, made the 1st day of November, 1928, to secure $750,000.00 in principal amount of 6½% Fifteen Year Debenture Bonds dated November 1, 1928, as registered in the Register's Office of Davidson County, Tennessee, and as reported by Byrd Douglas, Esquire, Standing Master, in his report heretofore filed in this cause on March 20, 1935, said offer being made subject to the confirmation of said report with respect to the lien of said deed of trust and the properties and assets covered thereby.

Said properties and assets for which said offer is made are those specifically described on pages 80 to 84, inclusive, of the foregoing report of the Standing Master and comprise generally all the mechanical and other equipment of the Tennessee Publishing Company now being used by Lit J. Pardue, Receiver, and also all other machinery, equipment, office, furniture, typewriters, automobiles, trucks, mailing machines, files, records, books, library, morgue, rights, franchises, easements, good will, subscriptions and subscription lists, contracts for advertising, press franchises, including all the right, title and interest of the Tennessee Publishing Company in and to the membership in the Associated Press for use in the publication of the Tennessean Papers and all other press memberships to which the said Tennessee Publishing Company is entitled, excluding only those properties and assets known and described as material, supplies and merchandise which are the subject of sale or are consumable in the usual course of business and not legally subject to mortgage, cash, claims, book accounts, and bills and notes receivable.

Said offer is made expressly subject to all of the terms, conditions and provisions contained in the above mentioned deed of trust from Tennessee Publishing Company to Liberty Central Trust Company and E. J. Miller, as Trustees (now St. Louis Union Trust Company and E. J. Miller, Trustees), with respect to the sale of such properties, including the provisions

in Article Sixth thereof with respect to settlement and payment of the properties purchased under foreclosure sale and the right to make settlement by applying towards the payment of the purchase price and to be credited therewith any outstanding bonds and maturing and unpaid interest coupons to the amounts to which such bonds and interest coupons would be entitled upon a distribution among the holders of the bonds of the net proceeds of such sales after making the proper deductions for the costs and expenses of the sale.

For the remaining assets excluded from the foregoing offer, being those properties and assets known and described as materials, supplies and merchandise which are the subject of sale or are consumable in the usual course of business and not legally subject to mortgage, cash, claims, book accounts, and bills and notes receivable, including also any and all machinery and equipment purchased during the receivership and now being used by the Receiver and not included under the lien of the above mentioned deed of trust, the said Paul M. Davis offers the sum of $40,000.00.

The sale of all of the foregoing assets shall be free and clear of all liens and encumbrances and of all claims against any indebtedness of the Receiver, possession to be given upon the date of confirmation but settlement between the Receiver and the purchaser to be made as of October 7, 1935, with proper adjustments for operations subsequent to said date. If ordered by the court, the purchaser will assume any part or all of the designated indebtedness of the Receiver, taking proper credit therefor against the cash purchase price above set out.

In the event the court shall order all of the properties and assets of Tennessee Publishing Company sold in this cause under the terms and subject to the provisions of the aforementioned deed of trust, as hereinabove set out, such order to be entered herein within thirty days from the date of filing of this offer, the said Paul M. Davis agrees that the sums hereinabove offered for the purchase of the respective assets, subject to the conditions hereinabove stated, may be deemed and treated as an upset price at such sale and the said Paul M. Davis agrees to appear and bid said respective sums at any such sale so ordered by the court, and further agrees, upon the entry of any such order of sale, to forthwith deposit such sums in escrow or enter into a solvent bond or undertaking guaranteeing that he will appear and make such bid at said sale and pay the proposed purchase price for the respective properties unless a higher and better bid is offered and accepted by the court.

Respectfully submitted,

PAUL M. DAVIS.

INTERVENING PETITION, OBJECTIONS AND MOTION OF PAUL M. DAVIS, A LIEN CREDITOR

(Filed October 25, 1935)

Comes Paul M. Davis of Nashville, Tennessee, and leave of court being first had and obtained, intervenes in this cause, and respectfully shows to the court as follows:

I

Petitioner has recently acquired the Debtor's bonds, formerly held and owned by Canal Bank & Trust Company, in the principal sum of $250,000.00, being Bonds Nos. 1 to 250, inclusive, with interest coupons thereon at 6½% from November 1, 1932. At the time of the hearing before Byrd Douglas, Esquire, Standing Master in the cause of C. O. Carpenter, Receiver, against Tennessee Publishing Company, being the equity receivership cause in this court, said bonds were proven and filed by the said Canal Bank & Trust Company and were shown at that time to be pledged as security to a loan to said bank from the Reconstruction Finance Corporation, and were adjudged to be the lawful obligations of the Debtor in the amount aforesaid, and secured by the Indenture heretofore referred to and filed in this cause by American National Bank and other bond creditors. The total amount due on said bonds, including interest up to November 1, 1935, is $298,750.

II

Said indebtedness is secured by a lien on the Debtor's specific properties created and executed on November 1, 1928.

III

This bond creditor does hereby expressly decline to accept, approve or agree to any of the proposed plans of reorganization heretofore filed in this cause, including the proposed plan filed herein on October 23, 1935.

IV

This creditor does hereby object to the proposed plans upon each and every ground set out and contained in the objections of American National Bank of Nashville, also a bond creditor, in its various answers, amended and supplemental answers, motions and supplemental motions, and does hereby adopt all of such objections contained in the pleadings of the said American National Bank and insists upon the enforcement of all of his substantive rights in and to the specific properties covered by the Indenture, and avers all of said pro-

posed plans of reorganization seek to take from him, without his consent, all of said property rights as set out in detail in the pleadings of the said American National Bank, and this creditor relies upon his constitutional rights as guaranteed in the 5th Amendment to the Constitution of the United States, and avers that each and every one of said plans, if approved, will violate such rights.

V

Wherefore the said Paul M. Davis joins in the motion of the said American National Bank and other bondholders to dismiss the Debtor's petition, the same being futile and having no reasonable prospect for success, and not being filed in good faith.

BASS, BERRY & SIMS.
Attorneys.

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Paul M. Davis makes oath that the matters and things stated in the foregoing pleading are true, and those stated on information and belief he verily believes to be true.

PAUL M. DAVIS.

Sworn to and subscribed before me this 24th day of October, 1935. MARY E. WOODALL,

(SEAL) Notary Public.

My Commission expires Jan. 3, 1938.

OBJECTIONS OF C. O. CARPENTER, RECEIVER OF HOLSTON-UNION NATIONAL BANK, TO PROPOSED PLAN OF REORGANIZATION FILED HEREIN ON OCTOBER 23, 1935

(Filed October 25, 1935)

Comes C. O. Carpenter, Receiver of Holston-Union National Bank, and declines to accept or approve the proposed plan

of reorganization filed by the Debtor on October 23, 1935, and declines to consent thereto upon the grounds and for the reasons set out in his former pleadings in this cause, which he re-affirms and, expressly reserving all of his rights under the former proceedings in this cause, and without waiving the same, respectfully shows to the Court as follows:

I

Said C. O. Carpenter, Receiver of Holston-Union National Bank, is both a lien creditor and an unsecured creditor of the Debtor, holding its bonds in the principal sum of $28,000.00, with accrued interest at 6½%, as provided on coupons, since November 1, 1932, secured by a specific lien upon the properties of the Debtor created by an indenture executed on November 1, 1928, the exact amount of all of such indebtedness, both secured and unsecured, being as set out by this creditor's former pleadings in this cause, to which reference is here made. This creditor declines to accept said plan of reorganization in its capacity both as lien creditor or bondholder and as an unsecured creditor.

II

As shown by former pleadings in this cause, this creditor instituted an equity receivership proceeding against the Debtor in this Court on March 3, 1933, since which time all of the properties of the Debtor have been in the possession and custody and under the operation of Lit J. Pardue, Receiver, in which equity receivership cause all of the various bondholders were made parties and their rights, interests, claims and liens duly and finally adjudicated and this creditor duly prayed and moved for a judicial sale of the properties covered by the indenture to secure the bonds for the purpose of satisfying the same, and each and every one of the proposed plans of reorganization filed in this cause, including the one filed on October 23, 1935, seek to deprive this creditor and the other lien creditors of their substantive rights in and to a public sale, the right to retain the lien until the debt is satisfied in full, the right to appear and bid at such public sale and if purchased by this creditor to turn in bonds in satisfaction of the bid to the extent that his bond creditor would be entitled to the proceeds in distribution, and pending such foreclosure and judicial public sale the right to have the properties held and operated by a receiver and the rents and profits, if any, applied to the satisfaction of this creditor's and other bondholders' claims, and other substantive rights in and to the specific properties in violation of the Fifth Amendment to

the Constitution of the United States, upon which this creditor expressly relies, and therefore all of such plans, having been disapproved by all of the bondholders and more than a majority of the unsecured creditors, are futile and the entire proceeding should be promptly dismissed by the Court as having no reasonable prospect of success.

III

The plan seeks to scale down and reduce the bondholders claims by forfeiting, cancelling, and setting aside the accrued interest on the bonds, amounting to $146,250.00 as of November 1, 1935, and to take away the rights and liens of the bondholders in the specific properties to secure the payment of past due interest, in violation of the Fifth Amendment to the Constitution of the United States.

IV

The plan seeks to force the bondholders to accept a cancellation of accrued interest, an extension of time for the payment of the bonds at a different and new rate of interest than as provided in the indenture and secured by the lien of the specific properties and is, in legal effect, a cancellation of the existing bonds and the issuance of new securities in lieu thereof, with different maturities and interest rates, which has been declined by the bondholders and which violates their vested rights protected by the Fifth Amendment to the Constitution of the United States, and which also violates the express terms of Section 77 of the Bankruptcy Act as amended.

V

The proposed plan violates the express provisions of Section 77B of the Bankruptcy Act as amended, in that it does not provide for a transfer or sale of the properties or retention thereof by the debtor subject to the existing interest, claims or liens of the bondholders, but seeks recovery or repossession of said properties subject only to a lien in favor of the bondholders after a forfeiture of their accrued interest and extension of the maturity of the bonds and an alteration of the interest rate, and other modifications not permitted under the Fifth Amendment to the Constitution of the United States or under the provisions of Section 77B of the Bankruptcy Act as amended, including an involuntary waiver of all requirements as to the sinking fund and other provisions contained in the indenture to protect the interest of bondhold-

ers, all of which are secured by a lien on the specific properties.

VI

The provisions of Section 77B of the Bankruptcy Act as amended with respect to the debtor's retention of its property subject to all existing interest, claims or liens of creditors is applicable only where the debtor at the time the plan is proposed is in the possession of its properties, where, in the present case, Debtor is not in the possession of its properties, the same having been in the possession of an equity receiver since March 3, 1935.

VII

It is further shown that several responsible bidders (who are not owners of any of the bonds), in addition to Paul M. Davis, are desirous of bidding on the property of the Debtor. They have indicated a willingness to bid more than the amount offered by said Davis. Respondent verily believes the bondholders will receive more through the medium of a judicial public sale than through the plan of reorganization as amended. This respondent is engaged in the liquidation of the assets of an insolvent national bank. Accordingly it is his duty to liquidate the bonds for cash and he asserts that a judicial public sale affords him an excellent opportunity to do so, and that this is a substantive right of which he and those whom he represents can not be deprived.

For the foregoing reasons and upon the objections herein set out and those set out in former pleadings, all of which are relied on, this creditor again moves the Court to forthdismiss the Debtor's petition in order that the properties may be sold at judicial public sale without further expense or delay.

C. O. CARPENTER, Receiver of Holston-Union National Bank.

By FOWLER & FOWLER,
Solicitors.

OBJECTIONS OF AMERICAN NATIONAL BANK OF NASHVILLE, A LIEN CREDITOR, TO PROPOSED PLAN OF REORGANIZATION FILED HEREIN ON OCTOBER 23, 1935, AND MOTION TO DISMISS DEBTOR'S PETITION

(Filed October 25, 1935)

Comes American National Bank of Nashville, a lien creditor, and, expressly reserving all of its rights under the former proceedings in this cause, declines to accept or approve any of the various plans of reorganization proposed by the Debtor, including the plan filed in this cause on October 23, 1935, upon the grounds and for the reasons heretofore set out in this creditor's answer, amended and supplemental answer, and its motion and supplemental motion to dismiss the Debtor's petition in response to the order to show cause made by the Court at the time the petition was originally filed, and respectfully shows to the Court as follows:

I

This creditor reaffirms and adopts each and all of the allegations and reservation of rights contained and set out in its former pleadings in this cause.

II

This Court has heretofore rendered a final decision and signed and lodged a final decree with the Clerk specifically dismissing the cause as futile because of the established inability of the Debtor to procure the necessary consent of the majority of the affected creditors of each class, and because the various proposed plans of reorganization sought to deny the bondholders' substantive rights in the specific property covered by the lien to secure the bonds without their consent, and the plan now proposed since the signing of said decree is likewise subject to the same objections in that no bond creditor has approved the plan and more than two-thirds in amount of said bondholders have, by pleadings in this cause, expressly declined to accept or approve the plan.

III

This creditor is the lawful owner and holder in due course of Debtor's bonds in the principal sum of $210,000.00, with interest coupons at 6½% which are past due from November 1, 1932, the amount of said bonded indebtedness held by this creditor as of November 1, 1935, being $250,950.00, which indebtedness is secured by a lien on the Debtor's specific prop-

erties, created and executed on November 1, 1928, and said proposed plan of reorganization can not be approved or confirmed by the Court in the absence of express acceptance and approval by more than two-thirds in amount of the holders of said bonds because to do so would deprive this creditor and other bondholders of its vested substantive rights in the specific properties under said indenture and under the laws of the State of Tennessee, as set out specifically in this creditor's amended and supplemental answers and amended and supplemental motion heretofore filed in this cause.

IV

The proposed plan of reorganization can not be approved or confirmed because more than fifty percent of the unsecured creditors have, by pleadings in this cause, expressly declined to accept or approve the plan.

V

The plan seeks to scale down and reduce the bondholders' claims by forfeiting, cancelling, and setting aside the accrued interest on the bonds, amounting to $146,250.00 as of November 1, 1935, and to take away the rights and liens of the bondholders in the specific properties to secure the payment of past due interest, in violation of the Fifth Amendment to the Constitution of the United States.

VI

The plan seeks to force the bondholders to accept a cancellation of accrued interest, an extension of time for the payment of the bonds at a different and new rate of interest than as provided in the indenture and secured by the lien of the specific properties and is, in legal effect, a cancellation of the existing bonds and the issuance of new securities in lieu thereof, with different maturities and interest rates, which has been declined by the bondholders and which violates their vested rights protected by the Fifth Amendment to the Constitution of the United States, and which also violates the express terms of Section 77 of the Bankruptcy Act as amended.

VII

The proposed plan violates the express provisions of Section 77B of the Bankruptcy Act as amended, in that it does not provide for a transfer or sale of the properties or retention thereof by the Debtor subject to the existing interest,

claims or liens of the bondholders, but seeks recovery or repossession of said properties subject only to a lien in favor of the bondholders after a forfeiture of their accrued interest and extension of the maturity of the bonds and an alteration of the interest rate, and other modifications not permitted under the Fifth Amendment to the Constitution of the United States or under the provisions of Section 77B of the Bankruptcy Act as amended, including an involuntary waiver of all requirements as to the sinking fund and other provisions contained in the indenture to protect the interest of bondholders, all of which are secured by a lien on the specific properties.

VIII

The provisions of Section 77B of the Bankruptcy Act as amended with respect to the debtor's retention of its property subject to all existing interest, claims or liens of creditors is applicable only where the debtor at the time the plan is proposed is in the possession of its properties, whereas, in the present case, Debtor is not in the possession of its properties, the same having been in the possession of an equity receiver since March 3, 1933.

Wherefore this creditor here and now again moves the Court to dismiss said petition, the same being futile and having no reasonable prospect for success and not being filed in good faith.

AMERICAN NATIONAL BANK OF NASHVILLE.
By BASS, BERRY & SIMS,
Attorneys.

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Paul M. Davis makes oath that he is President of American National Bank of Nashville; that he is familiar with the matters and things stated in the foregoing pleading, and that the statements made therein are true and those made on information and belief he verily believes to be true.

PAUL M. DAVIS.

Sworn to and subscribed before me, this 24th day of October, 1935.

(SEAL)

MARY E. WOODALL,
Notary Public.

FILATION ORDER OF AMENDMENT TO RE-ORGANIZATION PLAN OF OCT. 23

The Debtor asked leave of the Court on the 25th day of October, 1935, to file an Amendment to the Plan of Reorganization filed on October 23, 1935.

The Court granted the motion and ordered the amendment filed as of that date.

This order is made by the Court on November 15, 1935 and ordered entered as of October 25, 1935.

GORE, Judge.

AMENDMENT TO PLAN OF RE-ORGANIZATION FILED OCTOBER 23, 1935

(Filed October 25, 1935)

Comes the debtor, the Tennessee Publishing Company, a corporation, and moves the Court that it be allowed to amend its plan of re-organization, filed herein on October 23rd, 1935, by adding at the end of paragraph VI therein, the following:

"That, at the time the original bill was filed in this Court, on the ..... day of March, 1933, by C. O. Carpenter, Receiver vs. Tennessee Publishing Co., that there was no interest, or any other amount for any other reason, due or unpaid on the alleged outstanding bond issue, and that all of the interest, up to that time, had been paid, and nothing was due thereon.

That said alleged bonds were in no way in default at that time.

That the original bill filed therein was not predicated upon any allegations that there was any default whatever on any of the bonds; but, the bill was based entirely upon other matters, and the Receiver was appointed by the Court, therein, upon other allegations contained in the bill, and with no reference whatever to any default on the bonds, or the interest thereon.

That the reports of the receiver, appointed by the Court, in the Receivership case, and as thoroughly confirmed by the

report of the American Appraisal Co., which company was designated by the Court as the Appraiser to value the property of debtor.

That the Receiver had an abundance of funds, in his hands, during the operation of the Receivership, to have paid all of the accrued interest on said bonds, if any was due, but he has not used the money that way; but, on the other hand, has used it for other purposes, as shown in his reports.

In fact, it is disclosed that he has spent some Forty-five Thousand Dollars of the receipts of the operation of debtor's business in extending the circulation, establishing and building up extravagant agencies in different towns, and establishing motor deliveries, the result of which has been probably to increase the circulation, but not to add materially to the value of debtor's properties, as the exorbitant cost of the same has not reflected favorably in the returns therefrom; it not materially adding to the revenue derived from the advertising in the papers.

In addition to the above expenditures, the Receiver has added very materially to the cost of operation of the business, and as debtor is informed, and believes, has unnecessarily increased the salary expenses alone approximately Ninety Thousand Dollars per year. This is clearly shown and demonstrated in the report of the Appraiser filed herein.

Again, the Receiver has paid out of the receipts of debtor's business a large sum of money, as shown by his reports and the report of the Appraiser, fully Sixty Thousand Dollars, on an unsecured claim of a creditor, whose debt was in existence and due from the debtor, if due at all, prior to the appointment of the receiver in the Receivership case. This money debtor believes to have been paid illegally and unlawfully, and that it would have gone a long ways towards preventing any default on any of said alleged bonds. This money was paid to certain ones of the bondholders herein, but not on their bonds, but on this old pre-existing debt, which stood in the same class as all other unsecured creditors.

In this connection, debtor also deems it its duty to remind the Court that one of the Attorneys of the Receiver, and who, as debtor understands, advised the Receiver to pay this money out on this old claim, as above set out, was during all of that time the Attorney for the American National Bank, which held a large block of these alleged bonds, and who has taken the lead, representing certain bondholders in the present case, at each and every hearing before this Court, and who has op-

posed each and every type of re-organization offered by the debtor. This same Attorney now represents also, in addition to the American National Bank, Mr. Paul M. Davis, who claims to be the holder, recently acquired, of Two Hundred and Fifty Thousand Dollars, face value, of said bonds.

Debtor feels it is its duty to, frankly, bring these matters to the Court's attention, at this time; although the same has been mentioned in Court, orally, numbers of times in the hearings in this cause, they have not been set out in writing and filed as a part of the record in the case, which is now sought to be done.

TENNESSEE PUBLISHING COMPANY.
By E. W. CARMACK,
President.

MEMORANDUM OF ORAL OPINION DELIVERED OCTOBER 15, 1935

(Filed October 23, 1935)

Upon the filing of the petition by the debtor corporation to reorganize under Section 77-B, an order was entered approving it as properly filed, and that it was filed in good faith. However, the right was reserved to any person in interest to object to it upon any legal grounds, and parties in interest were directed to show cause why it was not filed in good faith

Motions to dismiss the petition were seasonably filed by some of the bondholders. Later, the debtor filed a motion to dismiss the motion to dismiss filed by the bondholders.

There have been a number of hearings on this phase of the case, and at one time debtor offered to file a petition asking Court to take steps to ascertain the actual value of the bonds held by the bondholders.

Permission to file such petition was made at Cookeville, and the Court declined to permit it to be filed at that time, announcing that it would not be filed until an appraisal of the

property had been made and report was made. Appraisers were appointed and the report was made. Thereupon, the debtor seasonably filed another petition, asking, among other things, that the Court judicially determine the value of the securities held by the bondholders.

The question now comes on to be heard upon the motion of the bondholders to dismiss the initial petition; the motion is upon the grounds that the petition is not filed in good faith, and that debtor has not, and cannot, secure consent of the statutory amount of the creditors affected by the plan, and therefore, it would be futile and of no benefit to anyone to proceed further with the case.

It is averred in the motion that upon information and belief no one of the persons interested in the proposed plan of reorganization had any interest in the Tennessee Publishing Company either as stockholder, officer, employee, director, or otherwise, prior to the day before the filing of the petition; that on or about June fifth, 1935, the day before the time fixed by the Court to act upon the motion for an order of sale in the equity receivership case of C. O. Carpenter vs. Tennessee Publishing Company, pending in this Court, Mr. Edward W. Carmack and his associates acquired the entire common stock of the Tennessee Publishing Company, and that they knew at the time that the stock was worthless, for which they paid no consideration other than the purported cancellation of a small note signed by the former owner of the common stock and his son, both of whom, it is averred, were insolvent, and that the note was barred by the statute of limitations. It is then averred:

> "The whole purpose of the transaction being to engage in a highly speculative venture, the plan being to harass the bondholders and other creditors whose claims have been allowed in the receivership cause by dilatory tactics, and that such parties do not come within the intent and meaning of section 77-B of the Bankruptcy Act, and have no standing whatever in this Court as proper parties for the reorganization of the corporation and are not acting in good faith."

Referring to the plan proposed by the debtor, it is stated in the motion to dismiss:

> "The proposed plans of reorganization submitted by the petitioner debtor are wholly impracticable, have not the slightest chance of being successful, and further pro-

ceedings in this cause will be absolutely futile. As will be seen from the plans of reorganization, the petitioning debtor has no real estate, and assets consist largely of machinery, equipment, circulation, good will and accounts receivable, which are said by the petitioning debtor to be worth approximately $300,000.00 against a bond indebtedness exceeding $900,000.00 and an unsecured indebtedness exceeding $300,000.00."

It is averred further that there is no possibility or probability of the plan being adopted by the Court, because it is said that not a single creditor, secured or unsecured has approved or censented to the proposed plan of reorganization, and on the other hand, the bondholders holding $548,000.00 in principal amount of bonds out of a total issue of $750,000.00, have appeared in open Court and expressly and emphatically disapproved of said plan, and declined to agree thereto, and unsecured creditors holding more than fifty per cent of the unsecured debts have likewise appeared in open Court and expressly disapproved of the plan, and refused and declined to agree thereto.

It is averred that under no circumstances will the necessary consent of creditors, as required by the provisions of Section 77-B of the Bankruptcy Act, be obtained so as to permit the approval by the Court of the proposed plan of reorganization.

It is then averred that if the plans of reorganization are to be construed as proposing that the Court order an appraisal of the assets of the debtor which are subject to the lien of the trust deed to secure the bondholders, with a view of tendering cash or securities in the principal sum of approximately three hundred thousand dollars in settlement and satisfaction of the lien of said bondholders, and for the purpose of freeing the respective properties from said lien, it is averred that such proposal has been unanimously rejected by holders of all of said bonds who have in open Court and by pleadings in this cause, refused and declined to agree thereto:

That the bonds were issued by the debtor on November 1, 1928, secured by a deed of trust executed on the same day, which is duly registered in the Register's office of Davidson County, Tennessee, as required by law, and that prior to the passage of the Amendment to the Bankruptcy Act, known as 77-B, the holders of said bonds had acquired a fixed interest and property rights under the provisions and conditions of said indenture against the property and assets of the Tennessee Publishing Company; that under the laws of Tennessee, prior to the passage of the amendment by Congress, and

at the present time, the bondholders, as a matter of property, right, are entitled to have the properties and assets foreclosed and sold at public auction, either through proceedings in equity in any Court of competent jurisdiction, or by advertisement and proceedings provided in said indenture; and that,

> "Therefore any appraisal and payment to the bondholders of any amount in cash less than the full amount required to pay and satisfy their total indebtedness, including interest, without their consent, or involuntary scaling down of their indebtedness to the alleged present value of the property, would be a violation of the Fifth Amendment to the Constitution of the United States, and would constitute the taking of this creditor's property without due process of law, and if so construed said amendment to the Bankruptcy Act, known as Section 77B is wholly inoperative, unconstitutional and void."

And the creditors then claim protection of the provisions of the Fifth Amendment to the Constitution, and specifically rely upon the protection afforded by it.

The motion to dismiss alleges that at the time of the passage by Congress of the Amendment to the Bankruptcy Act, Section 77B, the bondholders had acquired substantive rights in the specific property covered by the indenture. It is then averred that a bona fide offer by Mr. Paul M. Davis, of four hundred thousand dollars has been made, for the mortgaged property; and that, therefore, the present value of the interests of the bondholders is in excess of three hundred thousand dollars, and is four hundred thousand dollars.

Having determined that the petition was filed in the manner prescribed by the Statute, it first becomes necessary to pass upon the question of whether or not the petition was filed in good faith.

Upon that question I find as a fact that it was filed in good faith. The petition was not filed by Mr. Carmack and his associates, but it was filed by the debtor corporation, and under the Amendment, Section 77B, the debtor is authorized to file such a voluntary petition. It is true that Mr. Carmack acquired all the common stock of the corporation, the day before the petition was filed, but the pleadings show, (and it is admitted that they may be taken as evidence on this hearing) that Mr. Carmack and his mother had been interested as preferred stockholders in the Tennessean Corporation for many years. Mr. Carmack is a newspaper man by profession, he is editor of, and manages, a daily newspaper at Murfreesboro, Tennessee. The petition states that for years he has endea-

vored to become connected with the Tennessean, and that for many months prior to the time he acquired the common stock from the former owner, he had been negotiating for it, and was trying to acquire it; that he had devoted much time and expense in interesting capital with a view of filing the petition and reorganizing the corporation; it states that he succeeded in acquiring the common stock on June 5th, 1935, that at a meeting of the stockholders on that date, new directors were elected and that they in turn elected officers of the corporation, and he was elected president; it is stated that a resolution duly and properly adopted, directed him to file the petition under 77B.

All informed persons know that the political history of Tennessee, for more than twenty-five years was made in and around this newspaper; and that the father of the present president of the corporation was a very prominent instrumentality in formulating the policies of the State, which, since the establishment of this paper, have found expression in legislative enactment, that the laws which he and the paper advocated still remain on the statute books of the State.

It is shown by the appraisal that the debtor's assets are capable of being developed into a very valuable property; that there are great possibilities for the paper, if properly managed, and that it is a good financial investment.

Aside from that the connection of Mr. Carmack's family with the Tennessean, and the establishment of the paper would naturally cause him, from sentimental reasons, to aspire to connection with it, and to become its editor.

There is no proof in the record, and there is no allegation in any of the pleadings as I remember, to the effect that Mr. Carmack is to become financially interested in the paper, other than his ownership of a small amount of the preferred stock, and the common stock.

As stated, I can readily see from sentimental as well as from financial reasons, that Mr. Carmack would like to become connected with the paper.

I see nothing in the record which would indicate that his purchase of the stock was solely for speculative purposes, or was to hinder and delay or embarrass the bondholders in the equity proceedings.

Upon the other hand I know, and I find as a fact, that the attorneys for the debtor have been quite diligent and persistent in asking the Court to expedite the matter, and bring the issues to a termination in some way. I find nothing in the

record which indicates that their purpose was to delay the determination of the equity case.

Another evidence of good faith is the plan proposed. I do not intend now to say, or to intimate, that in the event I should overrule the motion to dismiss the petition, (in fact, that question will be dealt with later) that the plan proposed will be approved by the Court; in fact, the first plan was filed on July 13, 1935; subsequently the alternative plan was filed on August 31, 1935, and on today, an amendment to the plan has been offered, and filed, and just how many more amendments will be made, or offered, just what plan, if any will be adopted, yet remains to be seen; but I do say that there is nothing in the plans which would suggest that the application is not in good faith.

So, I find as a fact that the application is not only not in bad faith, but it is in good faith.

It is said in the motion to dismiss that the plan is not capable of execution, and that the proponents of the plan are unable to perform the covenants and agreements set out therein. As to that I do not know, I do know that they say they have capital behind them; that they can make good every proposal offered in the plans, and that they have sufficient financial backing. In the second plan it is proposed to give security that they will comply with its provisions, if accepted. They also propose, if the lien holders are unwilling to accept new security, for their debts, they will pay in cash, the value of the property covered by the mortgage, the value to be judicially determined by the Court. I have no reason to doubt that they can do just what they say they can do. Of course, if they should fail to do so, it would result that the plan would fail, and another plan would be offered, or else the estate would be liquidated in another way. I certainly would not be justified at this time, in finding that they are not financially able to carry out the proposals of the plans.

There are some features of the plans which commend themselves to me. It is conceded that the value of the property is nothing like sufficient to equal the amount of the face value of the mortgage lien; i. e., it is conceded that if the property is disposed of in any way, at public sale or otherwise, its fair cash value will not equal the face value of the bonds outstanding against it. If that be true, of course there is nothing left for the unsecured creditors and the stockholders—preferred or common. It is shown by the report of the Standing Master in the equity case, that the unsecured debts in round numbers, amount to three hundred thousand dollars. It is averred in the pleadings and in the motion to dismiss,

that in addition to this three hundred thousand dollars, the mortgaged property will lack several hundred thousand dollars of paying the claims of the bondholders, and therefore the deficit thus arising will cause them to become common creditors for the difference, which will amount to several hundred thousand dollars; but, notwithstanding that, the plan offers to the unsecured creditors a hundred thousand dollars of five per cent interest non-accumulating preferred stock.

For some reason, (unknown to the Court) a great majority of the unsecured creditors are unwilling to accept that stock. Out of say three hundred thousand dollars of unsecured creditors as reported by the Standing Master, only about eleven thousand dollars come into Court and agree to accept the proposition. It is hard to understand why that is so, it looks to me that if I were an unsecured creditor, I would choose preferred stock in any amount in a new corporation, to nothing. It savors of a collusion which doesn't look good. Just why an unsecured creditor would rather have nothing, than to have preferred stock in a new corporation is hard to understand.

I refer to these things to emphasize the fact that the petition, in my judgment, is filed in good faith.

CONCLUSIONS OF LAW

The question, therefore, to be determined, is, does this plan, if approved, deprive the lienholders of a substantive property right? Sub-section (e) of Section 77B, so far as is pertinent, reads as follows:

> "A plan of reorganization shall not be confirmed until it has been accepted in writing, whether before or after the filing of the petition or answer under this section, and such acceptance shall have been filed in the proceeding by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed, and would be affected by the plan and by or on behalf of stockholders of the debtor holding a majority of the stock of each class; provided, however, that such acceptance shall not be requisite to the confirmation of the plan by any creditor or class of creditors (a) whose claims are not affected by the plan."
>
> "Or, (b) if the plan makes provision for the payment of their claims in cash in full,"
>
> "Or, (c) if provision is made in the plan for the protection of the interests, claims, or liens, of such creditors

or class of creditors in the manner provided in sub-division b, clause 5, of this section."

Sub-division (b) clause (5) reads, so far as is pertinent, as follows:

"A plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise."

Clause 2 applies to the rights of stockholders.

Clause 3 provides for the payment in cash of all costs of the administration and other allowances made by the Court, with certain exceptions, the plan takes care of that.

Clause 4 pertains to stockholders; that is, therefore, not pertinent here.

Clause 5 reads:

"Shall provide in respect of each class of creditors of which less than two-thirds in amount shall accept such plan (unless the claims of such class of creditors will not be affected by the plan) or the plan makes provision for the payment of their claims in cash in full; provide adequate protection for the realization by them of the value of their interests, claims or liens is dealt with by the plan, either as provided in the plan (a) by the transfer or sale of such property subject to such interests, claims or liens, or by the retention of such property by the debtor, subject to such interests, claims, or liens, or (b) by a sale free of such interests, claims or liens, at not less than a fair upset price and the transfer of such interests, claims or liens to the proceeds of such sale; or (c) by appraisal and payment either in cash of the value either of such interests, claims or liens, or at the objecting creditor's election, of the securities allotted to such interests, claims or liens, under the plan, if any shall be so allotted, or (d) * * * *"

It is under clause (c) above, that the debtor asks his plan be approved.

The first method stated is (a) (5) sub-division "b", by the transfer or sale of such property subject to such interests, claims or liens. To transfer or sell the mortgaged property would defeat the purpose of the petition to reorganize, so same is not applicable here.

The second method: "Or by the retention of such property by the debtor subject to such interests, claims or liens." The

debtor cannot do that, because none of the bondholders are willing for the debtor to retain the mortgaged property, and debtor does not offer to pay cash for the face value of the bonds. Or, (b) "By a sale free of such interests, claims, or liens, at not less than a fair upset price, and the transfer of such interests, claims, or liens to the proceeds of such sale." That cannot be done, because if the property is sold, there is nothing to reorganize, and would likewise defeat the purpose of the petition.

Or (c) "By appraisal and payment either in cash of the value either of such interests, claims, or liens, or, at the objecting creditors election of the securities, allotted to such interests, claims of liens under the plan, if any shall be so allotted." A sale of the property as just stated would render impossible a reorganization, and to arrive at the value of creditors "interests, claims or liens" by appraisal would be violation of their Constitutional rights. How, then, are we to ascertain the value of their securities? The face value of their securities being more than the value of the property pledged to secure them, plus any amount they might receive from a sale of the assets of the bankrupt not covered by the mortgage, as unsecured claims.

Under the trust deed, which was executed in 1928, the bondholders are given certain specific rights; they are entitled to have the gross amount of the mortgaged property applied toward the satisfaction of their debt.

Section 77B has been before the Courts a few times, and on all occasions has been held to be constitutional, but the direct question of whether or not the Court can judicially determine, without the consent of at least two-thirds of the number and amount of the claims affected, the value of securities, and also the value of property pledged to secure same, by appraisal or by any method except that specifically provided for in the indenture, or by judicial sale, has not been passed upon.

It is conceded that the mortgaged property is worth less than the amount of the indebtedness which it secures; and practically all of both the secured and unsecured creditors oppose the plan, and a large majority of them are affirmatively asking that the plan be not approved, and they also ask that the property be sold either, under the trust deed, or by judicial sale in the equity case. If the requisite number of creditors affected by the plan should ask the Court to adopt it, then it would be done without hesitation; but, can the Court judicially determine without a public sale, that the value of the securities is the value of the property as fixed

by the appraisal, in the face of the recitations in the trust deed that the property should be sold in a different way? I think not.

I shall read at length, at the risk of being tedious, from the case of Louisville Joint Stock Land Bank vs. Radford, 295 U. S. 555. This is the last pronouncement of the Supreme Court of the United States upon kindred legislation, and is therefore controlling in this case. There the Court was dealing with Section 75 of the Bankruptcy Act; the farmer had executed a mortgage on a tract of land prior to the enactment of Sub-Section "S" to Section 75, and he sought the relief attempted to be given him by that sub-section. The land was situated in the State of Kentucky, and under the laws of that State, mortgages and not trust deeds, are the form of security. The only method of foreclosing a mortgage is by judicial sale. In Tennessee we have both trust deeds and mortgages; and we may foreclose either by judicial sale, or the trust deed may provide a means of foreclosure.

(The Court thereupon read at length from the opinion in the Radford case, supra.)

Under the authority of this case, it is plain that if the property here involved is sold in any way which is not provided for by the trust deed or at a judicial sale, or if the value of the property, or the value of the securities should be determined by appraisal, or in any way not agreeable to two-thirds or more of the bondholders, and contrary to the way provided for in the trust deed, it would take away from them, (the bondholders) substantive rights in the property. I can understand why (sub-section (c) clause (5) is included in the Act, because by it, it is possible fo the debtor and two-thirds or more of its creditors to adopt a method of arriving at the value of the securities held by them, over the objections of a minority, and thereby obviate the expense and delay of a public sale. But to adopt that method over the protest of practically all, and without the approval or sanction of any of the class of creditors affected, and over the protest of practically all the unsecured creditors, would deprive them of their property without due process of law, in violation of the Fifth Amendment to the Federal Constitution.

I think the debtor is not entitled to ascertain the value of the securities by appraisal, take the property under the plan proposed, therefore I must sustain the motion to dismiss on that ground. It would be useless and expensive to go further with the proceedings, as I see it.

MEMORANDUM OF ORAL OPINION DELIVERED October 23, 1935

(Filed October 23, 1935)

In view of the financial condition of the Debtor's estate, and in the interest of all concerned, I must dispose of this case in order that it may be appealed, that the questions involved may be determined by a higher Court without delay.

It is shown that debtor's newspapers are losing money, so it would be unjust and inexcusable for me to further delay making a final disposition of the case.

I thought I had done this a few days ago, but I permitted counsel to file another plan, if they could, that would comply with the opinion of the Court announced at that time.

Before disposition of the case, I desire to refer briefly to some matters contained in the amended plan which I think should be corrected.

I do not think the conclusions reached by the draftsman of the amended plan, filed October 23, 1935, are in all respects supported by the oral opinion delivered from the bench on October 15th. In the preliminary statement to the present amended plan, it is stated that the Court held that the plans that had, at that time been filed, appealed to the Court as feasible and workable, and that he would have been pleased to approve the plan, except, that same was not approved by two-thirds of the bondholders, and therefore, was violative of the Fifth Amendment to the Constitution of the United States; and that the Court stated that if the plan provided for the retention by the debtor of its property, subject to the claims and interest of the secured creditors, in the Court's opinion, would have been constitutional, and violate no rights of the secured creditors.

What the Court said upon that question was, that the plan was proposed in good faith, and as an evidence of good faith, it contained certain provisions relative to unsecured creditors, stockholders, etc., which appealed to him, but I did not say that the plan was feasible and workable, and that, but for the lack of approval by two-thirds of the bondholders, I would be glad to approve it. On the contrary, it was stated. "I do not intend now to say, or to intimate, that in the event I should overrule the motion to dismiss the petition, that the plan proposed will be approved by the Court." It was further stated, in reference to the proponents' ability to carry out the provisions of the plan, that the Court "had no reason

to doubt that they can do just what they say they can do" in this regard.

I think the draftsman of the amended plan misconstrued the language of the Court. I admit the conclusions of the Court were poorly stated, but I do not think what was said would justify the conclusion that the plan appeared to the Court to be workable and feasible, and that, but for the Constitutional questions, I would approve it. I could not properly have said that because at that time, the case was not in such condition as to justify an expression of opinion as to whether the plan would be approved or not.

The case now comes upon a new plan—filed on the 23rd of this month—subsequent to the oral opinion delivered on the 15th.

I believe it would manifestly be unjust to the bondholders to undo what has been done in the equity proceedings of the case of Carpenter, Receiver vs. Tennessee Publishing Company. In that case the validity and amount of the bonds outstanding was established. The debtor was a party to that suit; the question was submitted to the Standing Master, and he made his report covering that question. The report, I am informed, is unexcepted to. Hence it would result in a very great injustice to everyone to reconsider the validity and amount of the bonds, and undo what has been done in that case. These two cases have been going along together, and being tried and considered together, in all the hearings that have been before the Court.

It is admitted, and in fact, is abundantly shown by the report of the Standing Master in the equity case, that the debtor is notoriously insolvent.

Referring now to the present plan, filed October 23, 1935, the Court is asked to judicially determine the value of the securities. and upon that value, debtor proposes to issue new bonds, or to credit the present bonds with the value of its property, to be determined by the Court.

MR. POPE: Not the value, but the amounts due.

THE COURT: In view of the bankrupt condition of debtor, I am unable to see how the bondholders could possibly realize the value of their bonds, or how the value of the bonds are to be ascertained except by a public sale of debtor's property securing same. It appears to me that the effect of the last plan is to disregard what has been done in the equity receivership case, and to delay a final administration of the debtor's estate indefinitely. None of the bondholders are willing to adopt the plan; more than two-thirds of the bondholders have

by pleadings, affirmatively rejected it, and more than 50% of the unsecured creditors have affirmatively declined to accept the plan. If I should adopt it, or, if I should overrule the motion to dismiss the petition, it would amount to cramming down the throats of these secured creditors, a plan which they almost unanimously reject. I would be taking from them a substantive right that they have in the property, and the very best that could be said of it—the best excuse that the Court could offer—would be that it would postpone their right to a public sale of the property to such time as the Court might see fit to sell it. That is the most liberal construction in favor of the plan.

In view of the financial condition of debtor, a sale of its property is inevitable, and if I should adopt the last plan of the debtor which provides for scaling down of the face value of the bonds from one dollar to eighty cents, and returning the property to debtor, subject to the lien now existing in favor of the bondholders after crediting same with twenty cents on the dollar, and the Court to fix a rate of interest the debtor is to pay upon said bonds after crediting the same aforesaid, and if the Court should judicially determine the value of the bonds which are held by bondholders who are unwilling to accept eighty cents on the face value thereof, which amounts so fixed shall be declared to be the value of said bonds. Or, in the event the holders of said bonds are not willing to take the amounts thus fixed by the Court, in that event, the debtor to retain possession of its property subject to the lien now existing thereon to secure whatever amount the Court may determine is due would be, as announced by the Supreme Court in the case of Louisville Joint Stock Land Bank vs Radford, 295 U. S. 555, depriving the bondholders of substantive rights which cannot legally be done.

The plan is more or less an offer of composition provided for under Section 12 of the Bankruptcy Act; it was stated in the Radford Case that a composition is a voluntary offer, on the part of the debtor, and a voluntary acceptance on the part of the creditors; here, there is no acceptance by any of the secured creditors. If two-thirds of the secured creditors should agree to the plan, it would not deprive the minority of a property right for the Court to approve same. But, if none of the secured creditors are willing to accept the plan, and the Court should, notwithstanding, approve it, it would be depriving them of substantive rights in property, and would, therefore, be violative of the Fifth Amendment.

I can see no alternative except to dismiss the petition, and let the property be sold in the equity case.

FINAL ORDER AND DECREE

(Entered October 25, 1935)

This cause came on this day to be heard before the Honorable John J. Gore, Judge, upon the entire record and the motions to dismiss the debtor's petition and plans of reorganization, and after argument of counsel and due consideration thereof, the Court is of the opinion that said petition and the plans presented therein and thereby should be dismissed, except upon the ground that the petition was not filed in good faith, which ground of the motion is overruled, and for the reasons set out in the opinions of the Court, which are filed in this cause and ordered to be made a part of the record and a part of this decree, but need not be copied upon the minutes.

It is therefore ordered, adjudged and decreed that the petition of the debtor, Tennessee Publishing Company, and the various plans of reorganization set out therein and presented thereunder be and the same are hereby dismissed, and the costs taxed against the debtor, for which execution may issue.

GORE.

EXCEPTIONS OF C. O. CARPENTER, RECEIVER OF THE HOLSTON-UNION NATIONAL BANK, TO THE DECREE OVERRULING MOTION TO DISMISS PETITION UPON THE GROUND OF LACK OF GOOD FAITH

(Filed October 28, 1935)

Comes C. O Carpenter, Receiver of the Holston-Union National Bank, and excepts to the decree entered herein on October 25, 1935, insofar as said decree overrules the motion of bondholders to dismiss the petition of the debtor and plans of reorganization filed thereunder for lack of good faith.

C. O. CARPENTER, Receiver of Holston-Union National Bank.

By H. G. FOWLER,
Attorney.

FOWLER & FOWLER,
Solicitors.

DEBTOR'S EXCEPTIONS

(Filed November 7, 1935)

Comes the debtor, a corporation, and excepts to that part of the order of the Court entered herein on October 25, 1935, which sustained the various grounds of the motion to dismiss the petition for reorganization and the plans of reorganization, with the exception of the ground of its motion to dismiss alleging that the petition was not filed in good faith, which ground of the motion was overruled by the Court; and debtor also excepts to the grounds of the motion separately, except the ground alleging that the petition was not filed in good faith, and avers that each and all of said grounds of said motion so sustained should have been overruled and disallowed, and that the Court was in error in not so holding. Debtor also excepts to the action of the Court in dismissing the petition for reorganization; and also excepts to the action of the Court in dismissing and in failing to approve the first plan of reorganization filed by debtor; and also excepts to the action of the Court in dismissing the first plan of reorganization as amended, and in failing to approve the same; and also excepts to the action of the Court in dismissing the plan of reorganization filed on October 23, 1935, and in failing to approve the same. The debtor excepts also to the action of the Court as expressed in its opinion, made a part of the decree, in holding that any plan of reorganization proposed by debtor, it is necessary for debtor to have the approval of such plan, in writing, by at least two-thirds of the secured creditors, and/or two-thirds of the unsecured creditors of debtor corporation, and that without such approval the Court is without constitutional power or authority to approve any plan debtor might offer; and because the Court held in its said opinion that the Fifth Amendment of the Constitution of the United States forbids the Court to approve any plan of reorganization thereof not approved by at least two-thirds of the creditors affected thereby. Debtor also excepts to the action of the Court in failing to restore the properties of debtor to its possession pending the action of the Court on the petition for reorganization; and also excepts to the action of the Court in failing and declining to appoint a Trustee to take charge of the properties and assets of debtor, as provided by statute. Debtor also excepts to the action of the Court in failing and refusing to entertain the plan proposed by debtor to have the bonds outstanding against the property of

debtor appraised, as provided by statute, and judicially to fix the value thereof.

WHITE & HOWARD
LEWIS S. POPE
ROBERTS & ROBERTS,
Attorneys for Debtor.

This Oct. 31st, 1935.

Enter now for Oct. 31st, 1935.
JOHN J. GORE, Judge.

NOTICE OF APPEAL

(Filed November 8, 1935)

AMERICAN NATIONAL BANK,
PAUL M. DAVIS,
C O CARPENTER, RECEIVER, ETC.,
J. C. BRADFORD & H. O. INGRAM,
R. H. M. ROBINSON & C. T. JAFFRO, RECEIVERS, ETC.,
W. E. NORVELL, JR., ATTY:

Please take notice that the debtor, Tennessee Publishing Company, will perfect its appeal within the time allowed to the United States Circuit Court of Appeals for the Sixth Circuit sitting at Cincinnati, Ohio, from the judgment rendered in the proceeding of In The Matter of Tennessee Publishing Company, Debtor, No. 17141, in the United States District Court for the Middle District of Tennessee, Nashville Division, on October 25, 1935, and from the order dismissing the petition and plans of reorganization of Tennessee Publishing Company.

WHITE & HOWARD
LEWIS S. POPE
ROBERTS &ROBERTS,
Attorneys for Petitioner.

The undersigned hereby accept legal service on behalf of

their respective clients of the foregoing notice of appeal, and acknowledge receipt of copy thereof on this November 5, 1935.

CECIL SIMS,
Attorney for American National Bank and Paul M. Davis.

FOWLER & FOWLER,
Attorney for C. O. Carpenter, Receiver.

WILLIAM WALLER,
Attorney for J. C. Bradford and O. H. Ingram.

THOMAS H. MALONE,
Attorney for R. H. M. Robinson and C. T. Jaffro, Receivers.

W. E. NORVELL, JR.,
Attorney for certain bondholders.

PETITION FOR APPEAL

(Filed November 8, 1935)

Now comes Tennessee Publishing Company, a corporation, the debtor in the above entitled cause in which debtor filed its petition and plans of reorganization of said corporation, by its counsel Lewis S. Pope, White & Howard, and Roberts & Roberts, and feeling it is aggrieved by so much of the order and final judgment of this Court entered against it dismissing its petition and its plans of reorganization entered by this Court on October 25, 1935, and sustaining certain grounds of the motion to dismiss said petition and plans of reorganization, it hereby prays that it be allowed an appeal to the United States Circuit Court of Appeals for the Sixth Circuit sitting at Cincinnati, Ohio, and in connection with this petition, it herewith presents its assignments of error and prays that said appeal be allowed from said parts of said order, to said appellate court; that a citation be issued directed to all parties who have filed in writing in this case their refusal to accept the

plan of reorganization submitted by debtor including American National Bank, Paul M. Davis, C. O. Carpenter, Receiver of Holston Union National Bank, J. C. Bradford, O. H. Ingram, and R. H. M. Robinson and C. T. Jaffro, Receivers of Minnesota Ontario Paper Company, and their attorneys of record, and any other parties to whom your honor may direct that notice be given, to appear before the Circuit Court of Appeals for the Sixth Circuit to do and receive what may appertain to justice to be done in the premises, and that a transcript of the proceedings and papers upon which said order or judgment of dismissal was made, be duly authenticated and sent to the United States Circuit Court of Appeals for the Sixth Circuit.

TENNESSEE PUBLISHING COMPANY

By E. W. CARMACK, JR.
WHITE & HOWARD,
ROBERTS & ROBERTS
LEWIS S. POPE,
Attorneys.

ASSIGNMENT OF ERRORS FILED BY DEBTOR, TENNESSEE PUBLISHING COMPANY

(Filed November 8, 1935)

Comes debtor Tennessee Publishing Company, and believing and alleging that in the record of the proceedings in the above styled cause there is manifest error which occurred upon the trial of said cause, and upon which it relies for its prosecution of appeal herein, and assigns the following errors to-wit:

I

The Court erred in dismissing the petition of debtor filed on June 6, 1935, for its reorganization. The Court having held that said petition was filed in good faith, and had jurisdiction of debtor and its properties, should have sustained the same and allowed debtor to reorganize either upon one of the plans

submitted in this case or upon some other plan satisfactory to the Court.

II

The Court erred in dismissing and in failing to approve the first plan of reorganization filed on July 13, 1935 as amended.

III

The Court erred in dismissing and in failing to approve the plan of reorganization filed on October 23, 1935.

IV

The Court erred in holding that Section 77-B of the Bankruptcy Act requires that two-thirds of the creditors of debtor, secured and/or unsecured, should approve in writing the proposed plan of reorganization, and that since debtor has not secured the approval of such two-thirds, the Court would not and could not approve any plan of reorganization.

V

The Court erred in holding and adjudging that Section 77-B of said Bankruptcy Act in so far as its purports or attempts to empower and authorize the District Court to approve a plan of reorganization without the consent in writing of two-thirds of its creditors, secured and/or unsecured, is unconstitutional and void as being violative of the due process clause of the Fifth Amendment of the Federal Constitution.

VI

The Court erred in failing and refusing to hold that it had the full power and authority to approve a plan of reorganization, either with or without the approval in writing of two-thirds of the creditors, secured and/or unsecured, of debtor corporation.

VII

The Court should have held that Section 77-B is in all respects valid and constitutional, and that, under a proper construction thereof, the Court is empowered and authorized, without the consent of two-thirds of the creditors of debtor, to approve a plan of reorganization and complete the process of reorganization, and in all respects to confirm the plan of

reorganization under the bankruptcy laws and especially under Section 77-B thereof.

VIII

The Court erred in not allowing the petitioner, after its petition had been held to have been filed in good faith to submit any other or further plan of reorganization, acting upon the construction placed upon Section 77-B that because petitioner could not secure the approval of two-thirds of the creditors of debtor, secured and/or unsecured, that no plan it might offer would or could be approved by the Court.

IX

The Court erred in failing and refusing to return to debtor its property, he having sustained the petition as having been filed in good faith.

X

The Court erred in failing and refusing to appoint a trustee and to deliver property of debtor to him in the event that the Court refused to return the property to the debtor itself, the trustee should have been appointed as the statute provides.

XI

The Court erred in failing and refusing to permit the debtor to pay into Court in cash the appraised value of its properties as determined by the Court.

XII

The Court erred in failing and refusing to permit debtor to pay into Court in cash the appraised value as determined by the Court of the interest liens and claims of the various creditors.

XIII

The Court erred in failing and refusing to permit debtor to reorganize by taking its property subject to the liens and deeds of trust thereon as offered by the debtor in its plan of reorganization filed on October 23, 1935.

XIV

The Court erred in failing and refusing to ascertain and judicially determine the value of the alleged lien claims

against debtor, and in failing and refusing to ascertain and judicially determine the value of the property of debtor covered by the alleged deed of trust, and in failing and refusing to allow debtor to reorganize its business and affairs by taking over the assets covered by said deed of trust subject to the value of the lien claims and/or the value of the property of debtor covered by the deed of trust, and the Court erred in not permitting debtor to go forward with the reorganization plan proposed, or proceeding further with the steps necessary to completing and confirming a plan of reorganization, either in manner and form as proposed by debtor, or in such manner and form as would have met the approval of the Court and as submitted by debtor, notwithstanding the fact that it did not, on the hearing, have the approval in writing of two-thirds of the secured and unsecured claims against debtor.

Wherefore said Tennessee Publishing Company, debtor, prays that the judgment of the District Court may be reversed in the above styled cause.

ORDER ALLOWING APPEAL

(Entered November 8, 1935)

Be it remembered that this cause came on for hearing and was heard on November 5, 1935, by the Court on the petition of debtor, Tennessee Publishing Company, a corporation, to be allowed an appeal to the United States Circuit Court of Appeals for the Sixth Circuit, from the action of the Court in dismissing the petition and plans of reorganization of debtor, Tennessee Publishing Company, and taxing it with the costs and in failing and refusing to approve the plans of reorganization, which said petition was accompanied by an assignment of errors.

It is therefore considered, adjudged and ordered by the Court that the appeal prayed for by the petitioner, Tennessee Publishing Company, be granted, upon the execution of bond in the sum of Two Hundred and Fifty Dollars, conditioned as required by law. Said petitioner is allowed ten days from this date in which to file said bond for appeal and is allowed until November 30, 1935, in which to perfect its appeal by

having a transcript of the record printed and filed in the United States Circuit Court of Appeals for the Sixth Circuit.

Copy of appraisal of debtor's property made in the case of C. O. Carpenter, Receiver, vs. Tennessee Publishing Company and filed in this cause will be sent up in its original form, and shall constitute part of the record on appeal, without being copied.

Approved for entry:
GORE, Judge.

Approved as to form only:
CECIL SIMS, Attorney.
LAURENCE B. HOWARD.

CITATION

(Filed November 8, 1935)

You are hereby cited and admonished to be and appear at United States Circuit Court of Appeals for the Sixth Circuit to be held in the City of Cincinnati, in the State of Ohio, on the 30th day of November, 1935, pursuant to the appeal duly obtained and filed in the Clerk's office of the District Court of the United States in and for the Middle District of Tennessee, Nashville Division, in that certain proceeding wherein you as creditors of Tennessee Publishing Company, a corporation, debtor, are appellees and Tennessee Publishing Company, debtor, is appellant, and you are required to show cause, if any there be, why the order and decree in the said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable John J. Gore, Judge of the District Court of the United States for the Middle District of

Tennessee, Nashville Division, this the 5th day of November, 1935.

JOHN J. GORE,
United States District Judge.

Service of the above citation acknowledged this 5th day of November, 1935.

CECIL SIMS,
Attorney for American National Bank and Paul M. Davis.

FOWLER & FOWLER,
Attorney for C. O. Carpenter, Receiver.

WILLIAM WALLER,
Attorney for J. C. Bradford and O. H. Ingram.

THOMAS H. MALONE,
Attorney for R. H. M. Robinson C. T. Jaffro, Receivers.

W. E. NORVELL, JR.,
Attorney for Certain Bondholders.

APPEAL BOND

(Filed October 14, 1935)

Know all men by these presents, that we, The Tennessee Publishing Company, as principal, and E. W. Carmack and Oscar Noel as sureties, are held and firmly bound unto the United States for the use and benefit of all parties who may be interested, especially all stockholders, bondholders, and creditors secured and otherwise of The Tennessee Publishing Company, in the penal sum of Two Hundred Fifty ($250.00) Dollars, conditioned as follows:

Whereas, in the above entitled proceeding number 17141 in bankruptcy on the docket of the United States District Court

for the Middle District of Tennessee, Nashville Division, judgment was rendered and decree entered against the principal, The Tennessee Publishing Company, debtor, dismissing its petition for reorganization, its plans of reorganization, as amended, etc., all as appears of record, and the said Tennessee Publishing Company, debtor, has prayed and been allowed an appeal from said judgment to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati;

Now, therefore, the condition of the above obligation is such that if the said The Tennessee Publishing Company, debtor, shall prosecute its said appeal with effect or else satisfy said judgment of the Court and all costs and damages that may be assessed against it, then the above obligation to be void; otherwise, to remain in full force and virtue.

THE TENNESSEE PUBLISHING COMPANY.
By E. W. CARMACK,
President.

E. W. CARMACK,
OSCAR NOEL,
E. W. CARMACK,
Surety.
OSCAR NOEL,
Surety.

Approved:
GORE, Judge.

AFFIDAVIT OF SURETIES

COUNTY OF DAVIDSON,
STATE OF TENNESSEE.

Personally appeared before me, Richard J. Poteet, a notary public in and for aforesaid county and state, the within named Oscar Noel, and E. W. Carmack, both to me well known, who make oath that they, and each of them severally and separately, have, within the jurisdiction of this Court, unencumbered property in excess of the sum and amount for which they have made themselves liable in the appeal bond hereto attached, and in evidence whereof they hereto affix their signatures imediately hereunder.

E. W. CARMACK.
OSCAR NOEL.

(SEAL) RICHARD J. POTEET, Notary Public.
My commission Expires Aug. 4, 1938.

PRAECIPE

(Filed November 8, 1935)

TO THE HONOROBLE E. L. DUDNEY, CLERK OF THE U. S. DISTRICT COURT AT NASHVILLE, TENNESSEE:

You are hereby requested to make a transcript of the record in this cause to be filed in the United States Circuit Court of Appeals of the Sixth Circuit at Cincinnati, Ohio, pursuant to an appeal allowed in said cause and to include in such transcript of record the entire record in this proceeding including the following:

(1) Captions of the Court.
(2) Copies of all pleadings.

(3) Copies of all decrees and minute entries of the Court in said cause.

(4) Copies of all proposed plans of reorganization with amendments and supplements thereto filed by petitioner in this cause.

(5) Copies of all motions and answers thereto made and filed in this cause.

(6) Copies of all affidavits and exhibits filed in this cause.

(7) Copy of the appraisal of the properties of debtor made by American Appraisal Company in the case of C. O. Carpenter, Receiver, filed in this cause, the same to be made a part of the transcript of record in this cause by attaching the same in its original form.

(8) Copy of all opinions delivered by the Court in this cause.

(9) Copy of exceptions filed by the petitioner.

(10) Copy of petitioner's petition for appeal.

(11) Copy of petitioner's assignments of error.

(12) Copy of notice of petitioner's appeal and acceptance of service thereon.

(13) Copy of petitioner's citation and service of creditors' counsel thereon.

(14) Copy of petitioner's bond on granting appeal.

(15) Copy of this praecipe for transcript.

(16) Copy of Clerk's certificate.
This 5th day of November, 1935.

ROBERTS & ROBERTS,
LEWIS S. POPE,
WHITE & HOWARD,
Attorneys for Petitioner.

Service of the foregoing praecipe accepted this 6th day of Nov., 1935.

CECIL SIMS,
Attorney for American National Bank and Paul M. Davis.
FOWLER & FOWLER,
Attorney for C. O. Carpenter, Receiver, Etc.
WILLIAM WALLER,
Attorney for J. C. Bradford and O. H. Ingram.
THOMAS H. MALONE,
Attorney for R. H. M. Robinson C. T. Jaffro, Receivers.
W. E. NORVELL, JR.,
Attorney for Certain Bondholders.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERCIA, MIDDLE DISTRICT OF TENNESSEE.

I. E. L Dudney, Clerk of the District Court of the United States in and for the Middle District of Tennessee, do hereby certify that the foregoing pages contain a true, correct and complete record as called for in the praecipe filed by the attorneys for the appellant herein of the matter set out in the caption hereto, as the same appears from the records and files in this office.

Witness my hand as Clerk and seal of said Court at Nashville, Tennessee, on this 18th day of November, 1935, and of the independence of the United States of Omerica, the one hundred fifty-ninth year.

E. L. DUDNEY,
Clerk.
HAL H. CLEMENTS, Jr.,
Chief Deputy Clerk.

No.....

In The

Supreme Court of the United States

IN RE:

TENNESSEE PUBLISHING COMPANY, Debtor

Petition for Certiorari

TENNESSEE PUBLISHING COMPANY, Debtor
Petitioner

AMERICAN NATIONAL BANK
C. O. CARPENTER, RECEIVER, ETC.
J. C. BRADFORD AND O. H. INGRAM
R. H. M. ROBINSON AND C. T. JAFFRO,
RECEIVERS, ETC.,

COMMERCE UNION BANK
BROADWAY NATIONAL BANK, ET AL

Appellees

UNITED STATES OF AMERICA
UNITED STATES CIRCUIT COURT OF APPEALS
SIXTH JUDICIAL CIRCUIT

Pleas and proceedings had at a regular term of the United States Circuit Court of Appeals for the Sixth Circuit begun on the 1st day of October, 1935, before Honorables Charles

Certification of Clerk

H. Moorman, Charles C. Simons and Florence E. Allen:

TENNESSEE PUBLISHING COMPANY, Debtor
Petitioner

AMERICAN NATIONAL BANK
C. O. CARPENTER, RECEIVER, ETC.
J. C. BRADFORD AND O. H. INGRAM
R. H. M. ROBINSON AND C. T. JAFFRO,
RECEIVERS, ETC.,

COMMERCE UNION BANK
BROADWAY NATIONAL BANK, ET AL

Appellees

Be it remembered that heretofore, to-wit, on November 20, 1935, a transcript of the record in the above styled cause, pursuant to an appeal from the District Court of the United States for the Middle District of Tennessee, Nashville, Division, was filed in the office of the Clerk of said United States Circuit Court of Appeals for the Sixth Circuit at Cincinnati, Ohio, which said transcript was filed and docketed in said Circuit Court as No. 7266 and cross-appeal was docketed as No. 7267; also petition for leave to appeal under Bankruptcy Act, Section 24-B, which was granted, which is as follows, to-wit:

DEBTOR'S PETITION FOR LEAVE TO APPEAL UNDER BANKRUPTCY ACT, SECTION 24-B

TO THE HONORABLE JUDGES OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT:

Your petitioner, Tennessee Publishing Company, the above named debtor, conceiving itself aggrieved by the final order of the United States District Court for the Middle District of Tennessee, Nashville Division, made by Honorable John J. Gore, Judge thereof, on the 25th day of October, 1935, dismissing the petition for reorganization filed by debtor, and refusing to approve the plans for reorganization submitted and filed by it, files this its petition, addressed to the discretion of this Honorable Court, for leave to appeal in matter of law from said order of the District Court.

Your petitioner refers to the assignment of errors filed by it simultaneously with this petition, setting forth the errors made by the Court below, and giving the grounds for this appeal, and makes said assignment of errors Exhibit 1 hereto and a part hereof.

Your petitioner would show that its property and affairs had been administered by a Receiver appointed by the United States District Court for the Middle District of Tennessee in the case of C. O. Carpenter, Receiver, et al v. Tennessee Publishing Company, said receivership having commenced on .....day of March, 1933.

Shortly before the 6th day of June, 1935, your petitioner, with proper corporate authorization, made certain financial arrangements to the end and purpose of reorganizing under Section 77-B of the Bankruptcy Act, and in furtherance of said propositions, did, on the 6th day of June, 1935, file its petition for corporate reorganization under Section 77-B of the Bankruptcy Act in the United States District Court for the Middle District of Tennessee, Nashville Division.

That on the same day the Judge of the United States District Court entered an order reciting that said petition was properly filed, and filed in good faith, and fixing a thirty day period within which any person aggrieved by said order should show cause why the same should not be sustained.

That several of the parties owning the bonds of your petitioner filed answers attempting to have said order set aside and the matter came on for hearing on the 13th day of July, 1935. That at this hearing petitioner presented its first plan

or reorganization and asked that the Court approve the same as provided in Section 77-B, and also asked that debtor's property be returned to it under certain safeguards and certain guarantees, and your petitioner further asked that if the Court would not return its properties to it, a Trustee be appointed as provided in Section 77-B of the Bankruptcy Act to take charge of, manage and operate its said properties.

That reference is here made to said proposed plan of reorganization, as the same appears in the record, for the exact terms and conditions thereof, but in substance, said plan provided for the appraisal of debtor's property and the payment therefor in cash within a short period by the debtor in such manner and to such persons as might be ordered by the Court. Said plan asked in the alternative that if the Court thought proper an appraisal be made not of all its properties, but of the interest, claims and liens of its creditors in said property, and payment of the value of these interests, claims and liens by the debtor in cash within a short period.

Petitioner further asked that it be allowed to take its properties, and operate the same subject to the orders of the Court, and petitioner tendered into court $20,000.00 in cashier's checks as an evidence of its ability to finance said operation and as a guarantee that it would carry out its proposal, and specifically that it would guarantee interest to the lien holders of the appraised value of the property covered by a deed of trust. Said proposal also contained provisions guaranteeing to reduce the operating losses pending the final confirmation of the plan.

At the conclusion of said hearing on July 13, 1935, the Court took the matter under advisement and no decision was rendered therefrom or thereon until the order complained of in this matter, to-wit, the decree entered on October 25, 1935. The Court did, however, at that time state that it desired an appraisal made of the properties and such appraisal was thereafter made by the American Appraisal Company, who was appointed by the Court for that purpose, originally in the receivership case, but thereafter by proper order of the Court made the appraisal in this matter, the Court announcing at the time the appraisal was ordered that same would be used in both cases.

That your petitioner continued to press the matter, and conceiving that the Court might have some doubt as to the financial arrangements it had made for the purpose of reorganizing itself proposed to submit a guarantee to the Court, with such sureties thereon as would fully satisfy the Court

that it would pay up to $300,000.00 of the appraised price of said property. The Court likewise took this matter under advisement and no action was taken thereon until the final order entered on October 25, 1935.

That thereafter, towit, on or about the ..... day of ...., 1935, conceiving that the Court might be in some manner hesitant or disturbed by the provisions in its original plan providing for its issuance of new bonds, this petitioner filed another amended and supplemental plan of reorganization which eleminated the provisions of the issuance of new bonds and simply provided that petitioner would pay into court in cash the appraised value of its properties, or if the Court so ordered the appraised value of the interest, claims and liens of its creditors in and to said property.

A number of hearings were had before the Court until finally at hearing on or about Oct. 17, 1935, the Court delivered an opinion in which he held and found, both as a matter of fact and of law, the Judge's opinion being made a part of the record which is attached hereto, that the petition was properly filed, and in good faith, and in accordance with the requirements of Section 77-B of the Bankruptcy Act, and that the same had been diligently prosecuted by the debtor and its attorneys. The Court also held that the plan of reorganization provided that the debtor would pay in cash the amount fixed by the appraisal and the Court, that the property, belonging to the debtor, both that included under the deed of trust and that not so included, or the value of the securities, towit, the bonds held by the secured creditors. The Court further held that the plan of reorganization was not approved by as many as two-thirds of the holders of the bonds, on the contrary, that more than two-thirds had indicated by pleadings and personal appearance in Court that they were opposed to the plan of reorganizatoin, and further that more than fifty per cent of the unsecured creditors opposed the plan. This being true, the Court held in his opinion on or about Oct. 17, 1935, that the plan of reorganization could not be approved by the Court as, in the opinion of the Court, it would be and is a violation of the constitutional rights of said secured creditors because it took from them certain substantive vested rights in property without due process of law and would be and is in violation of the Fifth Amendment to the Constitution of the United States. Therefore, and for this reason, the Court refused and declined to approve the plan of reorganization as correctly and distinctly set out in his opinion, made a part of the record herein.

Immediately after this opinion was delivered by the Court

further time was asked by the debtor to submit an additional plan of reorganization. Said motion was granted by the Court extending the time for a week, and on October 23, 1935, another and additional plan of reorganization was submitted to the Court, which plan, in substance, provided that the debtor would reorganize its affairs and accept the return of its property subject to all the liens and claims, and only asking the Court to extend the time for the payment of the bonds secured by the mortgage, they having been declared to be due by the bondholders on account of the default of payment of interests. Said request contained in the plan of reorganization simply amounted to restoring the date of maturity and payment of said bonds to that fixed by the mortgage itself and appearing on the face of the bonds. Said plan further provided that after the Court had determined the full amount due on the bonds that debtor would take its property subject to the payment of that amount, with liens thereon to secure the same, as provided in the deed of trust, and to pay the interest thereon at such rate as the Court saw proper to fix. Said debtor proposed in the plan to furnish the Court sufficient and satisfactory guarantees of its ability to carry out the plan as submitted.

The case came on finally to be heard on the 25th day of October, 1935, and especially upon consideration of the plan last above mentioned, at which time the Court adhered to its former opinion delivered on October 17, 1935, and dismissed debtor's plan of reorganization, including all the plans of reorganization and the petition filed on June 6, 1935, at which time a final order of the Court was entered and an opinion of the Court delivered, copy of which is made part of the record herein.

Petitioner further alleges that no witnesses were introduced before the Court, no testimony heard, and that the Court's decision was based solely upon the record as made by the pleadings, plans of reorganization and exhibits.

In order that this Honorable Court may have before it, in exercising its discretion in granting or refusing this appeal, a complete history and record of this proceeding, a true and correct transcript thereof, is filed herewith and asked to be treated as a part hereof.

Petitioner further alleges that said order of the District Court is erroneous in matter of law in the particulars specified and set out in the assignment of errors simultaneously filed herewith. To be more specific, it is averred that the District Court committed error in dismissing the petition of petitioner filed on June 6, 1935, for the purpose of effecting its reorganization, and in failing to approve and dismissing

the first plan of reorganization and also the second plan of reorganization. It is further averred that the Court erred in holding that as a matter of law, Section 77-B of the Bankruptcy Act requires the approval of two-thirds of the creditors of petitioner of the proposed plan of reorganization, and in refusing to approve the plans submitted and filed by debtor because of the want of such approval.

It is further averred that the District Court was in error in failing and refusing to approve the plans of reorganization, as amended, without the consent of approval in writing of two-thirds of petitioner's creditors on the ground that to do so would violate the due process clause of the Fifth Amendment of the Constitution of the United States. The District Court should have held that Section 77-B of the Bankruptcy Act is in all respects, in so far as this petitioner is concerned constitutional and valid and that the Court could approve and confirm a plan of reorganization notwithstanding the fact that petitioner did not have the consent and approval in writing of two-thirds of its creditors.

It is further averred that the District Court was in error in failing and refusing to return the properties of debtor to it, or appoint a Trustee, and return the properties to him, after having held its petition for reorganization to have been properly filed and in good faith, such refusal being in violation of Section 77-B of the Bankruptcy Act.

Petitioner would further show to the Court that it has assembled new capital and experienced newspaper publishers for the reorganization of its affairs and has sought in every way possible to comply with the terms and requirements of the Statute, being Section 77-B of the Bankruptcy Act, to effect the reorganization of its business and to put it back upon its feet and at the same time salvage for its unsecured creditors certain interests in its new business by issuing preferred stock therein to the extent of $100,000.00 and to salvage to its preferred creditors a certain amount of their investment by issuing preferred stock to them to the extent of $25,000.00 and at the same time to pay in cash to the secured creditors the full value of the property included in the deed of trust or the value of the bonds themselves, either or both of which to be fixed by the Court, and under this plan of reorganization pay to the secured creditors the full value of their properties or securities and at the same time preserve to the unsecured creditors at least a portion of their claims against the debtor.

The learned Judge, as indicated by his opinion, looked with considerable favor to the petitioner's plans of reorganization, but felt constrained to overrule and dismiss the same, chiefly

if not alone, upon the grounds that he was of the opinion that it violated the constitutional rights of the secured creditors, in which opinion, the petitioner alleges, the Court has United States, and this error of the learned Dist. Judge constitutes and is the chief error assigned by petitioner, which it seeks to have this Honorable Court review and reverse.

Wherefore, your petitioner prays that it may be allowed in the descretion of this Honorable Court, to appeal in matter of law herein, that the prayer of said petition be granted, and a citation be issued to American National Bank, Paul M. Davis, C. O. Carpenter, Receiver, etc., J. C. Bradford, O. H. Ingram, R. H. M. Robinson, and C. T. Jaffro, Receivers, Etc., and W. E. Norvell Jr., Attorney, creditors, who are the only parties having intervened in this proceeding and made themselves parties hereto, commanding them to appear before the United States Circuit Court of Appeals for the Sixth Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record and proceedings in said proceeding, duly authenticated, may be submitted to the United States Circuit Court of Appeals for the Sixth Circuit.

This November ..... 1935.

TENNESSEE PUBLISHING COMPANY.

By E. W. CARMACK,
Petitioner.

LEWIS S. POPE
WHITE AND HOWARD
ROBERTS & ROBERTS

Attorneys for Petitioner.

STATE OF TENNESSEE
COUNTY OF DAVIDSON

Personally appeared before me, a Notary Public in and for the State and County aforesaid, E. W. Carmack, Jr., who makes oath that he is President of Tennessee Publishing Company, a corporation, petitioner hereinabove, that he is familiar with the facts set forth in the foregoing petition and is duly authorized to make this verification, and that the facts stated in the foregoing petition are true to the best of his knowledge, information ad belief.

Subscribed and sworn to before me this 18th day of Nov., 1935.

MAYVER MOORE,
Notary Public.

(SEAL)

My Commission expires May 10, 1938.

NOTICE OF FILING PETITION FOR REVIEW

To:

AMERICAN NATIONAL BANK,
PAUL M. DAVIS,
C. O. CARPENTER, RECEIVER, ETC.,
J. C. BRADFORD & O. H. INGRAM,
R. H. M. ROBINSON & C. T. JAFFFO, RECEIVERS, ETC.,
W. E. NORVELL, JR., ATTORNEY.

Please take notice that on the 20th day of November at 10:00 o'clock A. M., we will file in the Clerk's office of the United States Circuit Court of Appeals for the Sixth Circuit, in the City of Cincinnati, a petition for leave of appeal, to superintend and revise, and for review in the above entitled proceeding, a copy of which petition is annexed hereto and made a part of this notice.

LEWIS S. POPE,
WHITE & HOWARD,
ROBERTS & ROBERTS,
Attorneys for Petitioner.

Service of the above notice, together with copy of the petition is hereby acknowledged on this November 5, 1935.

CECIL SIMS,
Attorney for American National Bank and Paul M. Davis.

FOWLER & FOWLER,
Attorney for C. O. Carpenter, Receiver.

WILLIAM WALLER,
Attorney for J. C. Bradford and O. H. Ingram.

THOMAS M. MALONE,
Attorney for R. H. M. Robinson C. T. Jaffro, Receivers.

W. E. NORVELL,
Attorney for Certain Bondholders.

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT

No. 7266

TENNESSEE PUBLISHING COMPANY

vs.

AMERICAN NATIONAL BANK, C. O. CARPENTER, RECEIVER, ET AL,

CAUSES ARGUED AND SUBMITTED—January 7, 1936.
(Before: Moorman, Simons and Allen, JJ.)

These causes are argued by Lewis S. Pope and Albert Roberts for Tennessee Publishing Compnay; by Cecil Sims and H. G. Fowler for American National Bank, et al. and C. O. Carpenter, Receiver, and are submitted to the Court.

APPEAL from the District Court of the United States for the Middle District of Tennessee.

THIS CAUSE came on to be heard on the transcript of the record from the District Court of the United States for the Middle District of Tennessee, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed.

Enter:
(Signed) CHARLES C. SIMONS.

Filed: Feb. 13, 1936.

A true copy.

ATTEST: J. W. MENZIES,
Clerk, U. S. Circuit Court of
Appeals, Sixth Circuit.

Mandate of Court of Appeals
Mandate in Case of Tennessee Publishing Co., v. American National Bank
(Filed March 16, 1936)

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the District Court of the United States for the Middle District of Tennessee—GREETING:

WHEREAS, lately in the District Court of the United States for the Middle District of Tennessee, before you or some of you, in the Matter of Tennessee Publishing Company, Debtor, a decree was entered on the 25th day of October, 1935, overruling motion of C. O. Carpenter, Receiver of Holston-Union National Bank, to dismiss the petition of the debtor and plans of reorganization for lack of good faith, and dismissing the petition of the debtor, Tennessee Publishing Company, and the various plans of reorganization set out therein,

AND WHEREAS, the said Tennessee Publishing Company appealed to this court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord, one thousand nine hundred and thirty-five, the said cause came on to be heard before the said United States Circuit Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed.

YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

WITNESS the Honorable CHARLES EVANS HUGHES, Chief Justice of the United States, the sixteenth day of March in the year of our Lord one thousand nine hundred and thirty-six.

J. W. MENZIES,
(SEAL) Clerk, United States Circuit Court of Appeals for the Sixth Circuit.

Mandate of Court of Appeals
Mandate in Case of C. O. Carpenter, Receiver, v. Tennessee Publishing Co.
(Filed March 16, 1936)

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judge of the District Court of the United States for the Middle District of Tennessee
GREETING:

WHEREAS, lately in the District Court of the United States for the Middle District of Tennessee, before you or some of you, in the Matter of Tennessee Publishing Company, Debtor, a decree was entered on the 25th day of October, 1935, overruling motion of C. O. Carpenter, receiver of Holston-Union National Bank, to dismiss the petition of the debtor and plans of reorganization for lack of good faith, and dismissing the petition of the debtor, Tennessee Publishing Company, and the various plans of reorganization set out therein,

AND WHEREAS, the said C. O. Carpenter, Receiver, etc., appealed to this Court as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Sixth Circuit by virtue of an appeal agreeably to the Act of Congress, in such cases made and provided, fully and at large appears.

AND WHEREAS, in the present term of October, in the year of our Lord, one thousand nine hundred and thirty-five the said cause came on to be heard before the said United States Circuit Court of Appeals for the Sixth Circuit, on the said transcript of record, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered, adjudged, and decreed by this Court that the cross-appeal of C. O. Carpenter, Receiver, be and the same is hereby dismissed.

YOU, THEREFORE ARE HEREBY COMMANDED THAT such proceedings be had in said cause, in conformity with the opinion and decree of this Court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness the Honorable Charles Evans Hughes, Chief Justice of the United States, the sixteenth day of March in the year of our Lord one thousand nine hundred and thirty-six.

J. W. MENZIES,
Clerk United States Circuit Court of Appeals for the Sixth Circuit.

(SEAL)

IN THE

United States Circuit Court of Appeals

FOR THE SIXTH CIRCUIT,

AT CINCINNATI, OHIO.

In Re

TENNESSEE PUBLISHING COMPANY, Debtor

PETITION FOR REORGANIZATION

APPEAL AND CROSS-APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION.

It appearing to the Court that a decree was entered in this cause on February 13, 1936, confirming the action of the District Court in dismissing the debtor's proceedings for reorganization, and further dismissing the cross-appeal of certain bond holders and that the mandate of this Court has heretofore issued to the District Court of the United States for the Middle District of Tennessee at Nashville, now upon application of the debtor and with consent of the bondholders as evidenced by the signature of their respective counsel to this decree, it is ordered tha tthe said mandate be recalled and withheld pending the application of the debtor to the Supreme Court of the United States for the writs of certiorari and supersedeas.

BASS, BERRY & SIMS, Atty.
FOWLER & FOWLER, Attys.
WM. WALLER, Atty.
W. E. NORVELL, Jr.
MALONE & WADE, Attys.
WHITE & HOWARD,
LEWIS S. POPE,
ROBERTS & ROBERTS, Attys.
TRABUE, HUME & ARMISTEAD, Attys.

(Filed Feb. 13, 1936)

Nos. 7266-7267

United States Circuit Court of Appeals

SIXTH CIRCUIT

In Re Tennessee Publishing Company, Debtor.

Tennessee Publishing Company, Appellant,

No. 7266 v.

American National Bank, C. O. Carpenter, Receiver, et al., Appellees.

C. O. Carpenter, Receiver, Cross-Appellant,

No. 7267 v.

Tennessee Publishing Company, Cross-Appellee.

APPEALS from the District Court of the United States for the Middle District of Tennessee.

Decided February 13, 1936.

Before MOORMAN, SIMONS and ALLEN, Circuit Judges.

SIMONS, Circuit Judge. The main appeal is from a final order and decree dismissing the debtor's petition and plan for corporate reorganization under the provisions of * 77 (b) of the Bankruptcy Act as amended. The appeal was allowed by the District Judge, but the debtor later conceiving the appeal to be governed by * 24 (b), filed a petition with this

court for leave. It appearing that the petition was timely, we treat the appeal as having been allowed, and an order to that effect may be entered. The cross-appeal is from a final order incorporated in the decree overruling a motion to dismiss the debtor's petition on the ground that it was not filed in good faith as provided by the statute. The cross-appeal was likewise allowed by the District Judge, but no petition, timely or otherwise, for its allowance here was presented. A motion to dismiss the cross-appeal is before us. Regarding the main appeal as properly allowed under § 24 (b), **Vitagraph, Inc.,** v. **St. Louis Properties Corp.,** 77 Fed. (2d) 590 (C. C. A. 8); **Credit Alliance Corp.** v. **Atlantic, Pacific & Gulf Refining Co.,** 77 Fed. (2d) 595 (C. C. A. 8); **Campbell** v. **Alleghany Corp.,** 75 Fed. (2d) 947, 955 (C. C. A. 4); **Humber** v. **Bankers Trust Co.,** 70 Fed. (2d) 265 (C. C. A. 6), and regarding it also, as will later appear, as raising the question generally of the validity of the decree, whether based upon valid or invalid grounds, we give no consideration to the cross-appeal, and it may be dismissed.

The Tennessee Publishing Company, designated as the debtor, according to the statute, had for many years published both a morning and an evening newspaper in Nashville, Tennessee. On March 3, 1933, by general creditors' bill, its affairs were placed in charge of a receiver appointed by the District Court. The proceedings were filed by appellee Carpenter, receiver of a closed bank, which held $28,000 of the debtor's bonds, which were part of an issue of $750,000 dated November 1, 1928. The rate of interest borne by the bonds, and their maturity dates, nowhere appears, but they were secured by a deed of trust executed by the debtor, which provided that upon default in the payment of interest or principal the security might be foreclosed and sold at public auction, either through proceedings in equity or by advertisement.

The equity bill averred operating losses sustained by the debtor during the years 1929 to 1932. Losses continued during the receivership, but at a reduced rate. The usual reference to a master for consideration of claims followed, with the result that claims were filed in the total amount of approximately $1,500,000. A final hearing was set for June 6, 1935, and it was then the reasonable expectation of all parties in interest that a sale of assets would be ordered and the receivership terminated.

On June 5, 1935, Carmack, son of a former editor of the debtor's papers, acquired from the Leas, then its owners, all

of the debtor's common stock. He immediately had himself elected president, and instituted the debtor proceedings here involved under ℵ 77 (b). His first reorganization plan being objected to by the various classes of creditors, a second and a third plan of reorganization with modifications thereof followed. All were vigorously opposed by each interest concerned save for approval by a relatively small number of unsecured creditors. Not any of the bondholders gave assent to the plans proposed, and about 50% of the unsecured creditors have affirmatively opposed all reorganization plans.

Section 77 (b) provides for a scheme of corporate reorganization similar in many of its aspects to that provided for the reorganization of railroads engaged in interstate commerce by ℵ 77, discussed and held constitutionally valid in general scope and application in **Continental Bank** v. **Chicago, Rock Island & Pacific Railway Co.,** 294 U. S. 648. It provides that upon the filing of a petition for reorganization the court shall enter an order approving its filing if satisfied that the petition complies with the section and has been filed in good faith. The plan of reorganization shall include provisions modifying or altering the rights of creditors generally, or any class of them, either through the issuance of new securities or otherwise. Sub-section (e), insofar as pertinent, is as follows:

> "A plan of reorganization shall not be confirmed until it has been accepted in writing, . . . and such acceptaance shall have been filed in the proceeding by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed or would be affected by the plan . . . ; **Provided, however,** That such acceptance shall not be requisite to the confirmation of the plan by any creditor or class of creditors (a) whose claims are not affected by the plan, or (b) if the plan makes provision for the payment of their claims in cash in full, or (c) if provision is made in the plan for the protection of the interests, claims or liens of such creditor or class of creditors in the manner provided in subdivision (b), clause (5) of this section."

Insofar as the reorganization permitted by ℵ 77 (b) requires approval by two-thirds of the creditors of each class, and insofar as such approval is not requisite to confirmation from creditors whose claims are not affected, or for the payment of which cash is provided, 77 (b) follows substantially the provisions of ℵ 77. It departs from that section in clause (c) of the proviso, which makes approval of creditors unnecessary "if provision is made in the plan for the protection of the in-

terests, claims or liens of such creditor or class of creditors in the manner provided in subdivision (b) clause (5) of this section."

It therefore becomes necessary to consider sub-section (b), clause (5), which provides that the plan of reorganization,

> "Shall provide in respect of each class of creditors of which less than two-thirds in amount shall accept such plan (unless the claims of such class of creditors will not be affected by the plan, or the plan makes provision for the payment of their claims in cash in full), provide adequate protection for the realization by them of the value of their interest, claims, or liens, if the property affected by such interests, claims or liens is dealt with by the plan, either as provided in the plan (a) by the transfer or sale of such property subject to such interest, claims or liens, or by the retention of such property by the debtor subject to such interest, claims or liens, or (b) by a sale free of such interest, claims or liens at not less than a fair upset price and the transfer of such interest, claims or liens to the proceeds of such sale; or (c) by appraisal and payment either in cash of the value either of such interest, claims or liens, or at the objecting creditors' election of the securities allotted to such interest, claims or liens under the plan, if any shall be so allotted; or (d) by such method as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection;"

It will be observed that * 77 (b), unlike * 77, furnishes a method by which a reorganization plan may be put into effect in the event that the debtor is unable to secure consent to its plan of two-thirds of each class of creditors to be affected thereby, not only without their approval, but (by necessary implication) despite their opposition. The plan may provide under sub-section (b) (5) for the sale of the property subject to lien, for its sale free of liens and the transfer of the liens to the proceeds or for the method recited in clauses (c) and (d). With the first two of the methods incorporated in the sub-section we are not concerned, because the debtor does not desire to have the property sold either free from or subject to liens. It wishes to secure possession of the property and to resume its operation. We are concerned therefore only with the methods provided by which the debtor may regain its property without consent of creditors, have it appraised, and then relieve itself of obligation by paying each of them in cash, either (1) of the value of their interests,

claims or liens, or (2) at the creditors' election (of the value) of the securities allotted to such interests, claims or liens, if any shall be so allotted; or (3) by such method as will in the opinion of the judge equitably and fairly provide such protection.

The present debtor's several plans of reorganization, particularly the third, are in recognition of the futility under existing circumstances of securing the consent of two-thirds of its creditors of each class. It proceeds upon the assumption that such consent is not necessary by framing its reorganization plans under the alternative method provided by sub-section (b) (5). We assume it to be unnecessary to give detailed consideration to the first or second plan for, faced with a contention that neither is feasible, and that each would invade vested constitutional rights, it presented its third plan and modifications thereof, and we may assume that this represents up to the time of the decree, its ultimate effort to repel attack upon the feasibility of reorganization, and upon asserted invalidity in the application of the statute.

We confess our inability to understand the debtor's proposed reorganization plan in all of its phases, even after diligent study, effort to separate argument from concrete proposals, and an earnest attempt to reconcile apparently conflicting clauses. This much, however, seems reasonably clear: The debtor desires to have all the property which for two years has been in the possession of the equity receiver, including unmortgaged property, returned to it, subject to such liens as the court shall determine. It proposes that the bond holders shall have their securities scaled down to 80% of their face value, and that the court shall fix a reasonable rate of interest in place of the agreed interest. Non-assenting bond holders are to have the value of their securities fixed by the court, and to have a lien on the mortgaged property for such value, though it is also proposed to pay non-assenting bond holders such ascertained value in cash. The debtor proposes to pay for the unmortgaged property in the hands of the receiver the sum of $40,000 in cash at a time to be fixed by the court. For the further purpose of protecting bond holders, the debtor proposes to deposit $10,000 to pay interest in advance upon the bonds for a three months' period, but nothing is provided in the plan with respect to the defaulted interest upon the bonds during the two years that the debtor's properties have been in the hands of the receiver. Then follow provisions for a bond issue and for Class A and Class B preferred stock, out of the proceeds of which present unsecured creditors and preferred stock holders are to be compensated.

We make no effort to state them, for they are wholly incomprehensible. The court is also asked to reascertain the present holders of the debtor's mortgage bonds, and the amount due each bond holder, although a judicial determination as to these matters has already been had in the equity proceedings by a master with his report presumably confirmed by the court without objection thereto by the debtor, though a party to the receivership proceedings. From the argument, interwoven with the proposals of the submitted plan, it appears that the debtor is informed that some of the present bond holders have paid for their bonds an amount less than their face value, and it appears, inferentially at least, that the debtor desires the court to fix the amount due bond holders who have paid for their holdings since the beginning of the receivership an amount less than their face value, the amount so paid, and then have such amount scaled down to eighty cents upon the dollar. We are pointed to no provision of the statute which permits this to be done, and independent inquiry fails to disclose any.

The reorganization plan is opposed on the ground that it is not presented in good faith, and that any scaling down of secured indebtedness or of agreed interest, or denial of the right of lien holders to have the mortgaged property sold at public sale in accordance with the terms of the trust deed, is taking the property of the bondholders without due process in violation of the Fifth Amendment to the Constitution of the United States. While the court found the plan to have been presented in good faith, it is urged that the court erroneously applied the law; that good faith is not a question of honest motive or intention, but is to be determined by the feasibility of the plan, and a reasonable expectation that it will be successful, in reliance upon **Manati Sugar Company** v. **Mock, et al.,** 75 Fed. (2d) 284 (C. C. A. 2), and **In re 235 West 46th Street Company, Inc.,** 74 Fed. (2d) 700 (C. C. A. 2). The District Judge rejected the contention as to absence of good faith, but declared sub-section (b) (5) insofar as it permits adjustment of liens without the consent of creditors, constitutionally invalid and dismissed the petition.

We have first to consider whether the question of the debtor's good faith in submitting its proposed plan of organization is properly before this court upon the main appeal. This involves a consideration as to whether the decision below upon that question involves an issue of law cognizable upon appeal under § 24 (b). It is clear from the court's memoranda that in deciding the issue of good faith it was guided mainly by a consideration of the honesty of purpose on the part of

the debtor in submitting its plan. *77 (b) does not undertake to define good faith. We think it clear, however, in agreement with the Second Circuit, that something more than sincerity of intention was intended. The purpose of the statute is to relieve distressed debtor corporations, and to provide the mechanics for reorganization where reasonable expectation of continued useful existence may be fairly entertained. This being so, something more must be demonstrated by the debtor than mere honesty or sincerity of purpose. If not, then the way is open to the exploitation of every involved corporation by visionaries whose illusory and optimistic imaginations outrun their business judgments, and the interest of every legitimate creditor is at the mercy of debtors whose sole hope of financial salvation is an abiding faith in miracles. If we are right in this, there was erroneous application of the law in the finding of good faith, and the decree dismissing the petition should upon familiar principles governing appeals in equity be affirmed if right, however erroneous may be any given conclusion of law.

It appears from the record that the total assets of the debtor upon fair appraisal are worth less than $300,000. The bonded indebtedness exceeds $900,000, and the unsecured indebtedness is more than $300,000. To this must now be added the cost and expenses of the receivership. Moreover, the receiver has been operating at a loss, and the debtor concedes that it also will for a time operate at a loss, its most optimistic undertaking being, if the property is restored to it, to reduce current losses 25%. When these figures are considered together with the vagueness of detail in the proposed plan, the doubt that exists as to whether under *77 (b) there may now be a reopening of the adjudication of the claims against the debtor in the equity proceeding, it seems clear to us that the proposed plan is not a workable plan, offers no reasonable prospect for successful rehabilitation of the debtor, and is in consequence not, in the sense the phrase is used in the section, presented in good faith.

Having concluded that the plan fails to meet the statutory test, it may appear that discussion should end here with mandate for affirmance of the decree, and that upon familiar principles no holding as to constitutionality of the assailed sub-section is required. As was said by the Supreme Court in **Howat** v. **Kansas,** 258 U. S. 181, 184, "Obviously we should not pass upon the constitutional validity of an act . . . unless the case before us requires it," and in **Euclid** v. **Ambler Co.,** 272 U. S. 365, 397, "In the realm of constitutional law, especially, this court has perceived the embarrassment which is

likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue." With profound deference to the canons of self-restraint to which courts subordinate their high power to inquire into the constitutional validity of acts of Congress, we have carefully explored the possibility of avoiding the constitutional question here presented. We are confronted with difficulty.

Faced with attack upon the feasibility of its plan of reorganization, the debtor has repeatedly presented alternatives and modifications. This is its right, not only by virtue of the liberal spirit of the statute, but by the express language of sub-section (f) (7), which provides that before or after a plan is confirmed changes and modifications may be proposed therein by any party in interest. The debtor having finally received approval of the court upon the good faith of its latest plan, proceeded no further in its efforts to comply with the statutory requirement in that respect. Were we now to rest decision solely upon lack of good faith, it would seem appropriate to permit further proposals, for the debtor, having been misled by the court, should not be precluded from further effort to meet statutory requirements. Moreover, we see no legal impediment to submission by the debtor, or at least by a group of friendly creditors, of an entirely new plan of reorganization not heretofore considered and adjudicated. In either event the constitutional question would remain open for ultimate decision upon perhaps no better presentation than at present, and the submission of amendments to more fully demonstrate good faith, purely academic and fruitless. In the meanwhile the property of the debtor, and the security of the lien holders, will be further depleted by operating losses of the receiver. We see no escape therefore from present decision upon the validity of sub-section (b) (5).

The constitutionality of 77 (b) in its general scope and application is not here assailed, and in view of the decision in **Continental Bank** v. **Rock Island Railway, supra,** is perhaps not open to successful assault. That case, however, goes no farther in its consideration of the due process clause of the Fifth Amendment than to hold that statutory provisions permitting delay in the enforcement of contracts affect only the remedy, and deals with a statute which does not permit adjustments of liens without lien holders' consent. Such delay in the application of remedies impairs no vested right, and this was also the rationale of the decision in **Home Building & Loan Association** v. **Blaisdell,** 290 U. S. 398, in consideration of the due process clause of the Fourteenth Amendment.

We are here concerned only with the validity of a clause which provides for adjustment of debts without the consent of creditors. It has long been settled that provisions in bankruptcy statutes authorizing compositions have never been held to invalidate them. This is because a composition is a matter of agreement between the bankrupt and his creditors as a class, with the will of the majority imposed upon the minority. **In re Lane,** 125 Fed. 772, 773; **Cumberland Glass Co.** v. **DeWitt,** 237 U. S. 447, 452.

We confine ourselves to the provisions of sub-section (b) (5), which outline a method for adjustment of claims of non-assenting creditors, and inquire as to their validity in the light of the due process clause. Upon this issue we view the decision of the Supreme Court in **Louisville Bank** v. **Radford,** 295 U. S. 555, controlling. Here, under Tennessee law, as there under Kentucky law, the lien holders had the right under their contract to retain the lien until the indebtedness secured was paid, the right to realize upon the security by a judicial public sale, the right to determine when such sale should be held, subject only to the discretion of the court, the right to protect their interest in the property by bidding at such sale, the right to have the mortgaged property devoted primarily to the satisfaction of the debt; and the right to control the property meanwhile during the period of default, subject only to the discretion of the court, and to have the rents and profits during such period applied to the satisfaction of the debt. These rights are substantive property rights, and any invasion of them under the authority of the present statute is as clearly violative of the due process clause of the Fifth Amendment as it was in the Radford case. We have no occasion to renew our excursion into the history of bankruptcy legislation, or to again undertake that realistic approach to the problem that we ventured upon in the Radford case when it was considered by us (74 Fed. [2d]576). That manner of approach was rejected by the Supreme Court as an aid to solution, and so must we now reject it when it is again urged upon us.

We hold sub-section (b) (5) of ✻ 77 (b) of the Bankruptcy Act unconstitutional and invalid in the respects indicated Stripped of invalidity the section is still an operable statute, and as to validity in its general scope and application there is no occasion for comment other than has been indicated.

The decree below is affirmed.

ALLEN, Circuit Judge, concurring. I concur in the conclusion and in that part of the decision which relates to the

unconstitutionality of the statute. The decision in **Louisville Joint Stock Land Bank** v. **Radford,** 295 U. S. 555, compels this result. I dissent, however, from that part of the opinion which defines "good faith" as requiring feasibility of the plan proposed. Congress, in enacting the statute, required simply that the District Judge should be satisfied of "good faith." In so doing, it doubtless bore in mind the fact that in innumerable cases covering every kind of legal situation, the courts of this country, from the highest to the lowest, have defined good faith as meaning honesty of purpose. It is an unfortunate circumstance that integrity and business acumen are not always united. In this statute the Congress required integrity, and the District Judge correctly found that good faith was shown in the submission of this plan.

Clerk's Certificate of the United States Circuit Court of Appeals, Sixth Circuit

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

I, J. W. MENZIES, Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, do hereby certify that the foregoing is a true and correct copy of transcript of record and proceedings in the case of Tennessee Publishing Company versus American National Bank, et al., No. 7266, as the same remains upon the files and records of said United States Circuit Court of Appeals for the Sixth Circuit, and of the whole thereof.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of said Court at the City of Cincinnati, Ohio, this 29th day of April, A.D., 1936.

J. W. MENZIES,
Clerk of the United States Circuit
Court of Appeals, Sixth Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 18, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

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MAY

CHARLES ELM

No. [redacted] 48

In The

Supreme Court of the United States

IN RE: TENNESSEE PUBLISHING CO., Debtor

Petition for Certiorari

TENNESSEE PUBLISHING COMPANY, Debtor
Petitioner

AMERICAN NATIONAL BANK
C. O. CARPENTER, RECEIVER, ETC.
J. C. BRADFORD AND O. H. INGRAM
R. H. M. ROBINSON AND C. T. JAFFRO,
RECEIVERS, ETC.
COMMERCE UNION BANK
BROADWAY NATIONAL BANK
ET AL

Appellees

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Nashville, Tenn.

FOWLER & FOWLER,
Knoxville, Tenn.

Attorneys for Appellees.

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Knoxville, Tenn.

Attorneys for Appellees.

TO THE HONORABLE CHARLES E. HUGHES, CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

PETITION OF TENNESSEE PUBLISHING COMPANY FOR THE WRIT OF CERTIORARI

Your petitioner, Tennessee Publishing Company, a Tennessee corporation, respectfully shows to the Court as follows:

-I-

That this Court has jurisdiction to hear and determine the questions raised in this petition, as hereinafter set forth under Section 347, (Judicial Code, Section 240, amended).

-II-

The date of the decree in the United States Circuit Court of Appeals for the Sixth Circuit at Cincinnati, Ohio, is February 13, 1936.

-III-

Said Circuit Court of Appeals modified and affirmed the judgment of the District Court of the United States for the Middle District of Tennessee, Nashville Division.

-IV-

STATEMENT OF THE CASE

Tennessee Publishing Company, a Tennessee corporation, publishing a morning and an evening edition of a daily newspaper at Nashville, Tennessee, filed its petition for reorganization under Section 77-B of the Bankruptcy Act, on June 6, 1935, in the United States District Court at Nashville, Tennessee. Said corporation had issued its first mortgage bonds

secured by deed of trust, on a large part of its machinery, equipment and certain other of its assets used in the publication of its newspapers, dated November 1, 1928, in the principal sum of $750,000.00. It was also indebted to various creditors by unsecured claims amounting to about $300,000.00. At the time of the filing of this petition for reorganization the corporation was in the hands of a receiver of said District Court appointed in the case of C. O. Carpenter, Receiver, Etc. v. Tennessee Publishing Company, et al, under a bill filed in March 1933, said Carpenter being receiver of a closed National Bank holding an unsecured claim against debtor and also holding its first mortgage bonds amounting to $28,000.00. At the time of the filing of said bill in March 1933, for the appointment of a receiver to conserve the assets of said corporation, its business was being neglected and its assets were being dissipated, under circumstances set out in said equity proceedings. However, interest had been paid on all its outstanding bonds and all said bonds had many years to run before maturity, and were in no wise in default.

After the receivership, by reason of increased expenditures in the operation of the papers, or otherwise, there was default in the payment of interest on the bonds. No foreclosure under the trust deed to secure the bonds was sought in the receivership bill. These facts appeared in the petition for reorganization, together with other necessary facts, and that debtor was unable to meet its debts as they matured, and that it sought and required relief under Section 77-B of the Bankruptcy Act. It is further set out in the petition for reorganization that the corporation's assets are in the hands of a receiver, that they are of substantial value, and that its assets when administered as a going concern, together with its good will, have an earning power and value which should be preserved by proceedings for reorganization under Section 77-B of the Bankruptcy Act; that such reorganization would be for the benefit of its creditors and all interested parties, whereas, if said assets are liquidated their value would be greatly diminished, that this is particularly true in this case because of the nature of the newspaper business. It further appears in the petition that an application had been made in the equity cause for a sale of the assets and property of debtor, under the equity bill in receivership, although no order for sale had been made in said cause. The District Court entered an order on June 6, 1935, reciting that the Court being satisfied that the petition complied with Section 77-B of the Bankruptcy Act and had been filed in good faith, it was ordered that the petition be approved as properly filed under

Section 77-B of the Bankruptcy Act. It was also ordered that the receiver in the equity cause be directed to retain possession of the business and affairs of petitioner subject to the further orders of the Court. A rule was then made on all parties to said receivership cause, and on all creditors and stockholders in debtor corporation, to appear and show cause, if any, as to whether or not the petition for reorganization should be dismissed.

Petitioner filed its first plan of reorganization on July 13, 1935, and later filed amended plans of reorganization. Some of the bondholders and some of the unsecured creditors protested against the approval of the plans of reorganization by pleadings duly filed in the case, and sought to have the petition, as amended, and the plans of reorganization dismissed. Various pleadings were filed in the District Court and numerous orders were made therein, when, on October 25, 1935, the District Court entered a final order reciting that "The Court is of the opinion that said petition and plans presented therein and thereby should be dismissed, except upon the ground that the petition was not filed in good faith, which ground of the motion is overruled, and for the reasons set out in the opinion of the Court, which are filed in this cause and ordered to be made a part of the record," etc. The District Judge stated in his opinion that "I find as a fact that it (the petition for reorganization) was filed in good faith." However, the District Judge held that the bondholders have certain specific rights under their deed of trust of November 1, 1928, and that although the question as to whether or not Section 77-B is valid and constitutional had not been passed upon by this Court, he held that under the case of Louisville Joint Stock Land Bank v. Radford, 295 U. S. 555, if the property covered by the trust deed is sold in any other way than as therein provided, or if the value of the property, or the value of the securities should be determined by appraisal, or in any way not agreeable to two-thirds or more of the bondholders, and contrary to the way provided for in the deed of trust, it would deprive the bondholders of substantive rights in the property as guaranteed to them by the Fifth Amendment to the Federal Constitution, and that since two-thirds of the bondholders had not approved the plan of reorganization the Court was powerless to compel them to accept any of the plans proposed for the reason that the bondholders would thus be deprived of their constitutional rights to a public sale of the property under the authority of the Radford case. For this reason, the petition for reorganization and the plans submitted by debtor were dismissed.

American Appraisal Company, an outstanding expert of

national reputation, was appointed by the Court to appraise the properties of debtor, both those covered by the trust deed and those not so covered. The report of the Appraiser showed that the property covered by the trust deed had a value of less than $300,000.00, and that the property not so covered was of considerably less value. The amount due, both principal and interest, on the outstanding bonds is about $900,000.00.

The original complainant in the equity cause, C. O. Carpenter, Receiver, etc., in his answer to the petition for reorganization alleged that "the total salable value of all the property of the defendant will not exceed $300,000.00." Paul M. Davis, who claims to have acquired $250,000.00, par value, of said bonds, long after the petition for reorganization was filed, he being also President of American National Bank, the claimed owner of $210,000.00, principal, of said bonds, filed his offer of purchase, immediately preceding the date of the final order of Judge Gore in October 1935, proposing to pay $400,000.00 for the property covered by the trust deed, on certain conditions stated in the proposition, and $40,000.00 for all the other assets of debtor.

The plan of reorganization filed by debtor on July 13, 1935, and amended thereafter, on October 15, 1935, submitted the following:

"The debtor offers to pay in cash on such reasonable terms and conditions as the Court may fix, the entire amount of the appraised value of the property of the debtor corporation as the same may be judicially determined by this Court, or the appraised actual cash value of all valid interests, claims or liens on any of debtor's property when judicially determined. Said payment to be made into Court or under such other arrangement as the Court may direct."

After the trial Court had indicated its opinion that the bondholders were entitled to a judicial sale unless two-thirds approved the plan, on October 23, 1935, debtor proposed a third alternative plan of reorganization, to the effect that it would take over the operation of its affairs, subject to all legal liens to the full amount that the Court determines to be due the holders thereof. That if the holders of the securities under the trust deed are willing to accept eighty cents on the dollar of the face value of the bonds so held by them, which would amount to $600,000.00, that the debtor would accept said amount as due and retain its property subject to the mortgage for that amount. And in the event that some

of the bondholders are willing to accept eighty cents on the dollar and others are unwilling to do so, debtor proposes to fix the amount due those willing to accept eighty cents on the dollar as the amount due them, the present deed of trust standing to secure them, and to have the Court determine the amount due other holders of outstanding bonds who do not agree to take eighty cents on the dollar of the face value thereof, and when the amount owing is so judicially determined and adjudged by the Court, the debtor will retain its property subject to said amount so fixed by the Court to be owing and same shall stand secured by the trust deed on the property. The plan says that "if the holders (of the bonds) are not willing to take this amount (eighty percent) as herein proposed, in that event, the debtor herein proposes to take its property subject to their liens to secure whatever amount the Court determines due them." The reason for the insertion of the offer to pay eighty cents on the face value of the bonds, or have the Court judicially determine the amount owing, was that the validity of said bonds was challenged in the equity case, and which had not been determined by the Court. All plans of reorganization provide for substantial benefits to unsecured creditors and preferred stockholders, thereby fully protecting the rights of all persons interested in debtor or its assets. This proposition contemplated a reasonable extension of the date of payment of said bonds and suggested the original date of maturity thereof fixed by the deed of trust, but provided that default for ninety days in payment of interest should mature the bonds. Debtor submitted to the Court its proposition to give a good and sufficient guaranty to the satisfaction of the Court of its ability to carry out its plans of reorganization. The trial Judge was entirely satisfied with the proposed guaranty of debtor, and held that the plans of debtor were filed in good faith.

Debtor prayed and was granted a direct appeal from the District Court to the Circuit Court of Appeals at Cincinnati and also filed its petition under Section 24-B of the Bankruptcy Act for leave to appeal, which was granted by said Circuit Court of Appeals. The case was advanced on the docket and orally argued on January 7, 1936, and an opinion was handed down on February 13, 1936. The United States Circuit Court of Appeals held that:

(1) The Court holds sub-section (b) (5) of Section 77-B of the Bankruptcy Act unconstitutional and invalid.

(2) That the Court confessed its inability to understand

debtor's proposed plan of reorganization, but held that it was not presented in good faith.

Petitioner is advised and verily believes and avers that in the judgment and opinion of said Circuit Court there is manifest error to the prejudice of the rights of debtor, upon both propositions above stated. That is to say, petitioner avers that said provision set out in sub-section (b)(5) of Section 77-B of the Bankruptcy Act is constitutional and valid, and that the petition and plans of reorganization of debtor were filed in good faith.

Petitioner therefore prays that it be permitted to file this petition in this Honorable Court, that the writ of certiorari be granted to the end that the judgment of the United States Circuit Court of Appeals for the Sixth Circuit may be corrected and reversed and that justice may be done in the premises.

Petitioner herewith presents its specifications or assignments of error, together with brief in support thereof, and makes same a part hereof.

E. W. CARMACK, JR.

Subscribed and sworn to before me on April 24, 1936.

(SEAL)

MAYVER MOORE,
Notary Public.

ASSIGNMENT OF ERRORS

I

The Honorable Circuit Court of Appeals erred in holding that sub-section (b) (5) of section 77-B of the Bankruptcy Act is unconstitutional and invalid. Said sub-section (b)(5) of Section 77-B is constitutional and valid.

II

Said Court erred in holding that the petition for reorganization was not filed in good faith.

III

Under said statute the trial judge is clothed with discretion

to ascertain and determine when a petition for reorganization is filed in good faith. The District Judge found as a fact and adjudged that this petition was filed in good faith. The Circuit Court of Appeals did not find that the District Judge had abused his discretion, and, therefore, was in error in holding that the petition was not filed in good faith.

IV

There is nothing in the record to support the finding of bad faith on the part of debtor.

V

The last alternative plan filed by debtor on Otcober 23, 1935, did not require action under sub-section (b)(5); and, even if same be held invalid, said plan should have been approved, regardless of sub-section (b)(5).

Wherefore, the Circuit Court of Appeals erred in refusing to remand the case to the District Court for action thereon and approval thereof.

BRIEF AND ARGUMENT

Opinion of District Court delivered October 15, 1935, (Record 111). Opinion of District Court delivered October 23, 1935, (Record 121). Opinion United States Circuit Court of Appeals, Sixth Circuit, 81 Fed., (2d) 463. Said opinion, this record, p.——.

Jurisdiction of this Court is claimed under Section 347, Judicial Code. Sec. 240., as amended. The judgment was rendered in the United States Circuit Court of Appeals for the Sixth Circuit on February 13, 1936. Record ———. That Court held that sub-section (b) (5) of Section 77-B of the Bankruptcy Act, as amended, (11 U.S.C.A. Sec. 208) is un-

constitutional and void, as violative of the due process clause of the Federal Constitution. 81 Fed. (2d) 468.

The Court sustained the contention of some of the bondholders that the reorganization plan amounted to taking of the property of the bondholders without due process, in violation of the Fifth Amendment to the Constitution of the United States. 81 Fed. (2d) 466. Said Court held that the petition and plan of reorganization were not filed in good faith. That Court held that the plan of reorganization fails to meet the statutory test of good faith, and that, since the trial Court held that since debtor had received the approval of the District Court upon the good faith of its latest plan, that there is no legal impediment to submission by the debtor of an entirely new plan of reorganization not heretofore considered and adjudicated, thus making it necessary to pass upon the validity of sub-section (b)(5) of Section 77-B of the Bankruptcy Act. 81 Fed. (2d) 467. The term "good faith" is treated as synoymous with feasibility.

STATEMENT OF THE CASE

Tennessee Publishing Company, debtor, is a Tennessee corporation, which publishes morning and evening daily newspapers in Nashville, Tennessee. It filed its petition under the authority of Section 77-B of the Bankruptcy Act in the United States District Court for the Middle District of Tennessee on June 6, 1935. (Record 2). This petition averred the necessary jurisdictional facts, among other things, that it was unable to meet its debts as they mature and that it required leave under Section 77-B of the Bankruptcy Act; that its assets were in the hands of a Receiver appointed by said District Court under an equity proceeding brought on March 3,

1933, which receivership is still pending. An order was entered by the District Court on June 6, 1935, reciting that the petition had been filed in good faith, and that it was approved as properly filed under Section 77-B of the Bankruptcy Act. The business and assets of debtor corporation were ordered to remain in the hands of the Receiver in the equity cause. A rule was made that all parties to said receivership case, and all creditors and stockholders in debtor corporation should appear and show cause, if any, as to whether or not said petition of debtor should be dismissed at a hearing therein set for July 6, 1935. (Record 1). An order of continuance was entered, and the case was heard on July 13, 1935, (Record 13), at which time debtor filed its plan of reorganization providing that

(a) The value of all the securities, towit: the bonds issued by debtor, be ascertained and judicially determined by the Court in this proceeding.

(b) That the value of all the assets of debtor be ascertained and judicially determined by the Court in this proceeding.

(c) That the costs of the receivership case be ascertained.

This plan proposed that ten year first mortgage bonds be issued in an amount amply sufficient to cover the value of all its properties to be judicially determined, to be set out in the plan.

On October 15, 1935, debtor filed its amended plan of reorganization, which provides as follows:

"(1) The Debtor offers to pay in cash on such reasonable terms and conditions as the Court may fix, the entire amount of the appraised value of the property of the debtor corporation, as the same may judicially be determined by this Court or the appraised actual cash value of all valid interests, claims or liens on any of Debtor's property when judicially determined., Said payments to be made into Court or under such other arrangement as the Court may hereafter direct.

Or if the Court so direct:

(2) The Debtor offers to pay in cash under the conditions and terms set out in paragraph (1) above, the appraised value of the property as judicially determined by this Court, covered in the recent appraisal of the American Appraisal Company and described therein as "Property covered by the mortgage and/or deed of trust," and to leave for liquidation in any manner deemed suitable by the Court the remaining property of the Tennessee Publishing Company.

(3) This amendment to the plan of reorganization heretofore filed in this cause shall, if the Court so order, supersede

and supplant all provisions in any plans of reorganization heretofore submitted by the Debtor, insofar as said plans of reorganization may be in conflict herewith, but no further or otherwise."

Record 86.

American Appraisal Company had theretofore been appointed by the Court to appraise the properties of debtor and had filed its complete detailed appraisal showing that the properties claimed by the bondholders to be covered by the trust deed executed to secure the bonds in the principal sum of $750,000.00, bearing date of November 1, 1928, had a value of about $295,000.00, and that the property of debtor not so covered was worth much less than that sum. This appraisal in a separate volume was sent up in its original form to the United States Circuit Court of Appeals. (Record 132).

On said date, October 15, 1935, the District Judge delivered his oral opinion, with respect to the plans of reorganization which had been filed up to that date. Debtor had submitted to the Court evidences of its ability to carry out its plans of reorganization. The Court stated that he found as a fact that the petition was filed in good faith. The Court said:

"So, I find as a fact that the application is not only not in bad faith, but it is in good faith.

It is said in the motion to dismiss that the plan is not capable of execution, and that the proponents of the plan are unable to perform the covenants and agreements set out therein. As to that I do not know, I do know that they say they have capital behind them; that they can make good every proposal offered in the plan, and that they have sufficient financial backing. In the second plan it is proposed to give security that they will comply with this provision, if accepted. They also propose, if the lien holders are unwilling to accept new security, for their debts, they will pay in cash, the value of the property covered by the mortgage, the value to be judicially determined by the Court. I have no reason to doubt that they can do just what they say they can do. Of course, if they should fail to do so, it would result that the plan would fail, and another plan would be offered, or else the estate would be liquidated in another way. I certainly would not be justified at this time, in finding that they are not financially able to carry out the proposals of the plan."

Record 116.

The Court further said, with respect to the non-assenting unsecured creditors:

"For some reason (unknown to the Court) a great majority of the unsecured creditors are unwilling to accept that

stock. Out of say $300,000.00 of unsecured creditors as reported by the standing Master, only about $11,000.00 come into court and agree to accept the proposition. It is hard to understand why that is so, it looks to me that if I were an unsecured creditor, I would choose preferred stock in any amount in a new corporation, to nothing. It savors of a collusion which doesn't look good. Just why an unsecured creditor would rather have nothing, than to have preferred stock in a new corporation is hard to understand.

I refer to these things to emphasize the fact that the petition, in my judgment, is filed in good faith."

Record 117.

The Court then referred to the law as set out in Section 77-B of the Bankruptcy Act. (Record 117). He then referred to the case of **Louisville Joint Stock Land Bank v. Radford,** 295 U. S. 555, stating that the adoption of the plan over the protest of practically all the unsecured creditors and of more than two-thirds of the bondholders would deprive them of their property without due process of law in violation of the Fifth Amendment of the Federal Constitution. (Record 120).

Thereupon, on Oct. 23, 1935, debtor filed its third plan of reorganization. (Record 93). Under this plan it proposed:

(1) To take over the operation of its affairs, taking the property subject to all legal liens, to the full amount that the Court determines due the holders thereof, this applying to all property of debtor included in the mortgage to secure the bond issue. If the holders of the securities so secured by mortgage are willing to accept eighty cents on the dollar of the face value of the bonds so held by them, making a total of $600,000.00 outstanding against debtor and certain of its property, debtor is willing to accept this amount as due and retain its property subject to its mortgage for that amount, the Court to fix a reasonable rate of interest for debtor to pay on said $600,000.00 in the hands of the secured creditors until same is matured and paid. Debtor proposes to agree upon a value of eighty cents on the dollar as to all bonds held by assenting bondholders, same to be secured by the existing mortgage, and to have the Court determine the amount due other dissenting holders of bonds who may be unwilling to take eighty cents on the dollar, and when the same is so judicially fixed by the Court in each individual case of the holders, the debtor will retain its property subject to said amount so fixed by the

Court to be due and secured by the mortgage on its said property.

(2) That the properties and assets of debtor not included in the mortgage, debtor proposes to take in addition to that covered by the mortgage, and will pay into Court the sum of $40,000.00 in cash therefor.

(3) Debtor proposes further to protect the holders of the bonds secured by the lien by paying to them, after the amount of interest is fixed by the Court as above provided, the interest in advance for a period of three months, and to guarantee to the Court and to the bondholders that this interest will be paid, the sum of $10,000.00 to take care of the interest for the first three months on said bonds, will be immediately paid into Court to be used in paying interest for the first three months, and that it is part of the plan that any time debtor does not pay the interest on said bonds in advance for a period of ninety days, that the whole of said outstanding issue shall become due and collectible and be foreclosed under the terms of the mortgage, that as soon as it is definitely determined how much will be paid the unsecured creditors from the proceeds of the sale of the proposed bond issue as above set out, debtor will issue class A preferred stock in sufficient amounts at the par value of $10.00 per share, to make up the deficit, if any shall exist between the total amount paid or to be paid the unsecured creditors, and the sum of $100,000.00 to be divided ratably among such unsecured creditors. This preferred stock shall bear fixed dividends of six percent per annum.

(4) As soon as it shall be definitely determined how much will be paid the preferred stockholders from the proceeds of the sale of the proposed bond issue, under its former plan, debtor will issue Class B preferred stock in sufficient amount to make up the deficit, if any shall exist, between the total amount paid, or to be paid, the preferred stockholders and the sum of $25,000.00, to be divided ratably among them, this Class B stock to bear a fixed dividend of five percent.

The outstanding bond issue in the hands of these contesting bondholders, or at least some of them, had been attacked by petitions filed by some of the creditors in the receivership cause, and the validity of these bonds had not been determined by the Court, and have not yet been determined by the Court in the equity cause, although the standing Master had reported, though prior to the filing of the pleading attacking same,

that said bonds are valid. This report of the standing Master has never been confirmed by order of the Court.

On the filing of this last plan the District Court delivered an oral opinion which appears on page 121 of the printed record. In the course of the opinion the Court said:

> "If two-thirds of the secured creditors should agree to the plan, it would not deprive the minority of a property right for the Court to approve same. But, if none of the secured creditors are willing to accept the plan, and the Court should, notwithstanding, approve it, it would be depriving them of substantive rights in property, and would, therefore, be violative of the Fifth Amendment. I can see no alternative except to dismiss the petition, and let the property be sold in the equity case."
>
> (Printed record 123)

A final order dismissing the petition and the plans of reorganization was entered on October 25, 1935, adjudging that

> "Said petition and the plans presented therein and thereby should be dismissed, except upon the ground that the petition was not filed in good faith, which ground of the motion is overruled, and for the reasons set out in the opinions of the Court," etc.
>
> (Printed record, 124)

The case was properly appealed by debtor both by petition to superintend and revise under Section 24-B and also by direct appeal from the District Court under Section 24-A of the Bankruptcy Act.

As heretofore shown, the United States Circuit Court of Appeals held sub-section (b) (5) of Section 77-B of the Bankruptcy Act unconstitutional and invalid. That Court also held that the plans of reorganization submitted by debtor were not workable and consequently not presented in good faith in the sense of the law. On this question the decision was not unanimous, Judge Allen dissenting.

PROPOSITIONS OF LAW

"Contracts, however express, cannot fetter the constitutional authority of the Congress. Contracts may create rights of property, but when contracts deal with a subject matter, which lies within the control of the Congress, they have a congenital infirmity. Parties cannot remove their transactions from the reach of dominant constitutional power by making contracts about them."

Norman v. B. & O. R. R. Co., 294 U. S. 240; 79 L. Ed. 885.

"Every member of a political community must necessarily part with some of the rights which, as an individual, not affected by his relation to others, he might have retained. Such concessions make up the consideration he gives for the obligation of the body politic to protect him in life, liberty and property. Bankrupt laws, whatever may be the form they assume, are of that character."

Canada Southern R. R. Co. v. Gebhard, 109 U. S. 527; 27 L. Ed. 1024.

"As in a state of civil society, property of a citizen or subject is ownership, subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the Government, and no obligation of a contract can extend to the defeat of legitimate government authority."

(Knox v. Lee and Parker v. Davis (Legal Tender Cases) 79 U. S. 457; 20 L. Ed. 312.)

Every bondholder of debtor acquired his bonds with the knowledge of the possible exercise by Congress of its constitutional power to enact uniform bankruptcy laws affecting his contract rights and subject to the "congenital infirmity."

It is settled law that a bankruptcy court has the power to sell property encumbered by liens or mortgages, regardless of the power of sale contained in deeds of trust and to transfer the lien from the property to the proceeds of the sale.

Van Huffel v. Harkelrode, 284 U. S. 227; International Shoe Company v. Pinkus, 278 U. S. 261; Isaacs v. Hobbs Tie & Timber Co., 82 U. S. 734.

The provision of Section 77-B here involved, sub-section (b) (5), does not differ in principle from the above legal proposition. It provides that the Court shall judically determine

the value of the property on which the lien exists and substitute that value for the property. This means that the Court may judicially determine the public-sale value of the property, as the equivalent of the proceeds arising from a public sale, and this sub-section does not, therefore, violate the due process clause of the Fifth Amendment because the mortgagee gets the full value of his property.

Assuming that the due process clause of the Fifth Amendment operates as a limitation upon the exercise of Congressional power under other sections of the Constitution, such as bankruptcy, interstate commerce, eminent domain, etc., this limitation is not more restrictive as against the exercise of legislative power of Congress under the one section of the Constitution than under any other section. The power of Congress to enact uniform bankruptcy laws is paramount and unrestrained except by the limitations upon its authority by the Fifth Amendment of the Constitution, which forbids the taking of private property for public use without just compensation or due process of law,

> "Has always been understood as referring only to a direct appropriation, and not to consequential injuries resulting from the exercise of lawful power. It has never been supposed to have any bearing on or to inhibit laws that indirectly work harm and loss to individuals."

L. & N. Ry. Co. v. Mottley, 219 U. S. 481; 55 L. Ed. 303. Legal Tender cases, 12 Wall., 550; 20 L. Ed. 311. Gibbons v. Ogden, 9 Wheat. 1; 6 L. Ed. 23.

Scranton v. Wheeler, 179 U. S. 162; 45 L. Ed. 137.

Union Bridge Company v. United States, 204 U. S. 364; 51 L. Ed. 523.

Addyston Pipe & Steel Company v. United States, 175 U. S. 211; 44 L. Ed. 136.

One of the strongest and best considered cases that has come under our observation on the point herein is that of Campbell v. Allegheny Corporation, 75 Fed. (2d) 947. Judge Parker delivering the opinion of the Court, said:

> "Little need be said as to the question which arises under the Fifth Amendment. There is no question of course, but that the exercise of the bankruptcy power by Congress, as is the case with other delegated powers, is subject to the requirement of due process contained in that Amendment. Monongahela Nav. Co. v. United States

148 U. S. 312, 336, 13 S. Ct. 622, 37 L. Ed. 463; Hanover Nat. Bank v. Moyses, supra, 186 U. S. 181, 192, 22 S. Ct. 857, 862, 45 L. Ed. 1113. But as any exercise of the bankruptcy power impairs the obligation of contracts, such impairment is not to be taken as in itself a denial of due process. For the provisions of the act to violate the amendment, they must be so grossly arbitrary and unreasonable as to be 'incompatible with fundamental law.'"

"The fact that secured debts are affected by the Act does not, of course, raise any grave constitutional question, and can be dismissed with brief comment. 'A secured debt or lien is, so far as the constitution of the United States is concerned, a no more sacred kind of property than an unsecured debt. **** And the constitution expressly permits and grants to Congress the exercise of the power to affect such property, whether it be an unsecured debt or whether it be a lien, by laws relating to 'subject of bankruptcies.'

"As a matter of fact, no property in any real sense is taken from the dissenting creditor when he is compelled under Section 77-B to scale his claim and accept securities in lieu thereof. The securities held by him have already shrunk in value before the proceeding under the act is instituted; and all that is required of him is that he face reality and accept his pro rata interest in the debtor's property in a form which will not jeopardize the rights of other creditors similarly situated."

(Campbell v. Allegheny Corporation, 75 Fed. (2d.) 954.

There is no deprivation of property in any real sense when secured creditors are compelled by law, such as Section 77-B, to accept, in place of their contract rights against the bankrupt estate, something which the Court finds, under the circumstances, to be the equivalent.

Canada Southern R. Co. v. Gebhardt, 109 U. S. 527; 27 L. Ed. 1020.

Assuming, however, that such deprivation is involved, it must be remembered that it is the essence of bankruptcy legislation to cut down the rights of individual creditors in order to insure to all an equitable portion of the debtor's assets. In re Vogler, Fed. Cas. No. 16986, at 1250. The secured creditor has no greater right to the protection of the Fifth Amendment

as against an exercise of the bankruptcy Act than the unsecured creditor.

In re Sterba, 74 Fed. (2d) 413.

In re Burgh, 7 Fed. Supp. 184.

Campbell v. Allegheny Corp. 75 Fed. (2d) 947.

Gerdes on Corporate Reorganizations, vol. 1. p. 101.

Section 77-B of the Bankruptcy Act is a bankruptcy statute and is a "law on the subject of bankruptcy." This Act contains the fundamental element of bankruptcy. It relieves the debtor of its obligations. It provides for the distribution of its property to its creditors.

Section 77- of the Bankruptcy Act, which applies alone to interstate railroads, and which, in all its essential provisions, is substantially the same as Section 77-B, which applies to other corporations, including Tennessee Publishing Company, was held by this Court to be constitutional.

Continental Illinois Bank & Trust Co. v. Chicago Rock Island Railway Co., 294 U. S. 648. 79 L. Ed. 1110.

In most of the cases decided in the lower Federal Courts under Section 77-B, the Act has been assumed to be constitutional, without objection. In the few cases in which the question has been directly considered and passed upon, the Courts have held it constitutional.

In Re: Central Funding Corp., 75 Fed. (2d) 256; Campbell v. Allegheny Corp., 75 Fed. (2d) 947; Vitagraph v. St. Louis Properties Corp., 77 Fed. (2d) 590;

Re: New Rochelle Coal & Lbr. Co., 77 Fed. (2d) 881. Grand Blvd., Invest. Co. v. Strauss, reported in C. H. New Matters Division, Sec. 3537;

Re: Pierce-Arrow Sales Corp., 10 Fed. Supp. 776; Re: Hotel Gibson Co., 11 F. Supp. 30. Re: Consolidated Coal Co., reported in C. C. H. New Matters Division, Sec. 3538.

We quote the following from Section 77 of the Bankruptcy Act, (e) viz:

"If the judge shall approve the plan, he shall file an opinion, stating his conclusions, and the reasons therefor, and enter an order to that effect, and shall send a certified copy of such opinion and order to the Commission. The plan shall then be submitted by the Commis-

sion to the creditors of each class, whose claims have been filed and allowed in accordance with the requirements of sub-section (c) hereof, and to the stockholders of each class and/or to the committees or other representatives thereof for acceptance or rejection, within such time as the Commission shall specify, together with the report or reports of the Commission thereon or such a summarization thereof as the Commission may approve, and the opinion and order of the judge: **Provided,** That submission to any class of stockholders shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, (a) that at the time of the finding the corporation is insolvent, or that at the time of the finding the equity of such class of stockholders has no value, or that the plan provides for the payment in cash to such class of stockholders of an amount not less than the value of their equity, if any, or (b) that the interest of such class of stockholders will not be adversely and materially affected by the plan, or (c) that the debtor has pursuant to authorized corporate action accepted the plan and its stockholders are bound by such acceptance: **Provided further,** that submission to any class of creditors shall not be necessary if the Commission shall have found, and the judge shall have affirmed the finding, that the interests of such class of creditors will not be adversely and materially affected by the plan, or that at the time of the finding the interests of such class of creditors had no value, **or that the plan provides for the payment in cash to such class of creditors of an amount not less than the value of their interests."** (Black type ours.)

We quote the following from Section 77-B, sub-section (b):

"(b) The plan of reorganization within the meaning of this section (1) shall include provisions modifying or altering the rights of creditors generally, or of any class of them, secured or unsecured, either through the issuance of new securities of any character or otherwise; (2) may include provisions modifying or altering the rights of stockholders generally, or any class of them, either through the issuance of new securities of any character or otherwise; (3) shall provide for the payment in cash of all costs of administration and other allowances made by the Court, except that compensation or reimbursement provided for in subdivision (c) clause (9), of this section, may be paid in securities provided for in the plan if those entitled thereto will accept such payment and the court finds such compensation reasonable; (4) shall pro-

vide in respect of each class of stockholders of which less than a majority shall accept such plan (unless the judge shall determine either that the debtor is insolvent, or that the interest of such class of stockholders will not be affected adversely by the plan), adequate protection for the realization by them of the value of their equity, if any, in the property of the debtor dealt with by the plan, either as provided in the plan, (a) by a sale of the property at not less than a fair upset price, or (b) by appraisal and payment in cash of the value either of their stock or at the objecting stockholders' election, of the securities allotted to such stockholders under the plan, if any shall be so allotted, or (c) by such methods as will do substantial justice to such stockholders under and consistent with the circumstances of the particular case; (5) **shall provide in respect of each class of creditors of which less than two-thirds in amount shall accept such plan** (unless the claims of such class of creditors will not be affected by the plan, or the plan makes provision for the payment of their claims in cash in full), provide **adequate protection for the realization by them of the value of their interest,** claims, or liens, if the property affected by such interests, claims, or liens is dealt with by the plans, either as provided in the plan (a) by the transfer or sale of such property subject to such interest, claims, or liens, or **by the retention of such property by the debtor subject to such interest, claims, or liens,** or (b) by a sale free of such interest, claims, or liens at not less than a fair upset price and the transfer of such interest, claims or liens, to the proceeds of such sale; or (c) **by appraisal and payment either in cash of the value either of such interests, claims, or liens, or, at the objecting creditors' election, of the securities allotted to such interest, claims, or liens under the plan, if any shall be so allotted; or (d) by such method as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection."** (Black type ours).

It will be observed that, on the point here directly in issue, the same provision is contained in both section 77 and section 77-B.

The Honorable United States Circuit Court of Appeals erred in holding that the case of **Louisville Joint Stock Land Bank v. Radford,** 295 U. S. 555, is controlling in the determination of the case at bar, for the following reasons:

(1) The Frazier-Lemke Act under consideration by this

Court in the case cited is not, in fact, a bankruptcy statute, because

(a) It makes no provision for the release of the obligations of the farmer debtor, which is essential in a bankruptcy statute;

(b) It makes no provision for the distribution of the assets or estate of the farmer debtor among his creditors;

(c) It arbitrarily and capriciously, and without just compensation to the creditor, allows the farmer debtor to retain the mortgaged property for an unreasonable length of time at a rate of interest so low as to amount to the taking of the creditor's property without due process of law.

(d) The opinion of this Court in this case states that the Court has "no occasion to decide in this case whether the bankruptcy clause confers upon Congress generally the power to abridge the mortgagee's rights in specific properties."
295 U. S. 589

(2) Section 77-B is, in fact, a bankruptcy statute. It provides,

(a) For the protection of all the various classes of creditors of the corporation;

(b) It provides for the release of the corporation debtor's obligations;

(c) It provides that, as to secured creditors, they must be paid in full, or shall be paid either in cash the "value either of such interest, claims or liens, or at the objecting creditors' election, of the securities allotted to such interests, claims, or liens under the plan, if any shall be so allotted, or by such method as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection."

The mere change of form of the secured creditors' property, or property rights, so long as the value thereof remains, does not violate the constitutional rights of the creditor. This is fittingly illustrative in the exercise of the power of eminent domain.

GOOD FAITH

The Good Faith Requirement of 77-B Is Met If The Petition Is Filed With An Honest Desire To Save The Company From Liquidation And To Keep It As A Going Concern.

In re: Prairie Avenue Building Corp., U. S. Dist. Ct., Eastern Dist. of Ill., decided June 19, 1935, 11 Fed. Supp. 125.

In re: Associated Gas & Electric Co. (Judge Mack) U. S. Dist. Ct. S. D. N. Y., October 26, 1934.

In re: Cheney Bros., U. S. Dist., Ct. of Conn., October 29, 1935.

In re: Surf Building Corp. U. S. Dist. Ct. E. D., Ill., October 17, 1934, 11 Fed. Supp. 295.

In re: South Coast Co., U. S. Dist. Ct. of Del. September 12, 1934, 8 Fed. Supp. 43.

An examination of the cases which hold that the good faith requirement of 77-B is not met because no feasible plan is presented, can be readily reconciled with the above authorities, because upon examination it appears that in none of those cases requiring the presentation of a feasible plan was it possible for the petitioning creditors or the debtor to present such a plan, and the facts so show. The true rule is that if it is manifestly impossible to perfect a plan of reorganization, then the petition could not be filed with an "honest desire" in the legal sense.

To hold that no petition under 77-B is filed in good faith when no plan of reorganization is adopted under and pursuant to said petition, would necessarily entail setting aside all petitions filed where successful reorganizations were not consummated, on the ground that the same were not filed in good faith. The statute (Sec. 77-B of the Bankruptcy Act) specifically provides a method for dismissing the petition for reorganization when no plan can be worked out thereunder.

Section b-8 of the Act provides for action by the Court, as follows:

> "If a plan of reorganization is not proposed or accepted within such reasonable period as the judge may fix, or, if proposed and acceptance is not confirmed, may, after hearing, whether proceedings be voluntary or involuntary, either extend such period or dismiss the proceedings under this section, or, except in the case of a railroad or other public utility, or of a debtor which has not

been found by the judge to be insolvent, direct the estate to be liquidated, or direct the trustee or trustees to liquidate the estate, appointing a trustee or trustees if none shall previously have been appointed, as the interests of the creditors and stockholders may equitably require."

From the above it will be seen that even if no plan of reorganization whatsoever is proposed, it is not required that the court shall dismiss the petition, but, on the other hand, the court is specifically authorized to "direct the estate to be liquidated."

In view of the above provision of the Act itself, we respectfully submit that the proposal of any plan of reorganization either before or after the filing of the petition cannot be held an essential element of the good faith provision.

We assume that the honest desire to save the company from liquidation and to keep it as a going concern requires that it must not be manifestly impossible for a reorganization to be effected. Applying this test of good faith to the instant case, it is obvious that the Tennessee Publishing Company as a corporation, having obtained new sources of capital, at least to the amount necessary to pay in cash the entire value of its property as the same might be determined by the court, could reasonably anticipate working out a successful reorganization plan.

All of the decisions hold that it is not necessary that the reorganization plan be formulated and approved before the filing of the petition, or even approved before the submission of such a plan for approval by the court. The debtor, Tennessee Publishing Company, could reasonably hope that in view of the new capital resources it had available, it could induce its creditors to accept some mutually satisfactory plan of reorganization. We respectfully submit that the record indicates that the reason it was not able to work out a plan of reorganization with the consent of its creditors is not because of financial considerations but because of the other considerations incident to and connected with the type of business in which debtor is engaged. Furthermore, debtor was reasonably justified in thinking that it could work out a reorganization, even without the consent of the proper majority of its creditors, in view of the plain provisions of section b-5 of Section 77-B of the Bankruptcy Act, the constitutionality of which section had not up to that time been questioned. Surely if the Congress of the United States could pass such an Act, deeming it constitutional, containing such a section, the debtor corporation, Tennessee Publishing Company, could

reasonably rely on the constitutionality of such a section until the same be held unconstitutional.

To hold that this debtor, Tennessee Publishing Company, was not guided by an honest desire to save the company from liquidation and keep it as a going concern when it filed its petition, because the surrounding facts and circumstances showed that it was manifestly impossible to reorganize the debtor, is entirely unjustified from this record. The debtor had attracted to itself sufficient new capital to reasonably anticipate the co-operation of its creditors in reorganization, and failing this it had attracted sufficient new capital to proceed to reorganize without the concurrence of the requisite number of its creditors by paying in cash the appraised value of the interests, claims or liens of such creditors, as provided in section b-5 of 77-B of the Bankruptcy Act.

Under these circumstances the normal thing to expect was a successful reorganization, and it is the unexpected which has happened, namely the failure to get the concurrence of its creditors and the action of the court holding unconstitutional section b-5 of 77-B of the Bankruptcy Act.

Section c-1 of Section 77-B of the Bankruptcy Act, provides for the appearance of three creditors in order to have the proceedings dismissed. This evidently is the section under which the creditors sought to have this petition to the debtor dismissed as not filed in good faith. A discussion of this procedure appears in an opinion by Thomas, District Judge, in a decision, In re: Chaney Bros., U. S. Dist. Ct. of Conn., October 29, 1935. The court there analyzes, and we believe correctly analyzes, the procedure as provided under Section 77-B. The dismissal of the petition in that case was asked on the ground that it was not filed in good faith. The court quotes 77-B, section c-1, as follows:

> "Appear and controvert the facts alleged in the petition or answer, the judge shall determine as soon as may be the issues presented by the pleadings, without the intervention of a jury, and unless the material allegations of the petition or answer are sustained by the proofs, the proceedings shall be dismissed."

and holds that the hearing herein provided for is limited to a traverse of the allegations, jurisdictional or otherwise, contained in the petition.

It will be noted that the Tennessee Publishing Company, debtor, fully sustained each and every one of the allegations contained in its petition of reorganization. It is well established that the petition for reorganization need not contain

any statement that a proposed plan of reorganization has been prepared or approved, and the analysis by Judge Thomas in re Chaney Bros., **supra.,** strengthens the belief that Congress did not intend, in its wording of 77-B, to provide that the good faith requirement should necessitate the presentation of any successful plan of reorganization, or any plan of reorganization, in the matter.

In summary, we submit that Section 77B of the Bankruptcy Act, taken as a whole, shows that the good faith requirement for the filing of the petition does not require that thereafter a feasible plan of reorganization be submitted, and point to the following as sustaining this interpretation.

(a) The petition for reorganization does not have to state that any plan of reorganization has been prepared, or that it can be successfully consummated, or that approvals have been obtained by the requisite number of creditors;

(b) The provision for the appearance of creditors in objection to the filing of the petition under Section 77-B limits the issues at the hearing to a determination of the material allegations of the petition. Section c-1 of 77-B of the Bankruptcy Act—In re Chaney Bros., **supra.;**

(c) The act provides that the debtor can submit a proposed plan of reorganization without the approval of any of the creditors and ask that the court approve the same in advance of submission to the creditors.

(d) Section b-8 of the Act provides that if no plan of reorganization is ever submitted, the court can, in its discretion proceed under 77-B, and liquidate the assets of the corporation.

It further appears that it would be an unusual, cumbersome and unnatural procedure for the court to be called upon to determine good faith in the filing of the petition at the time of the presentment of the same, and thereafter determine from the course of subsequent events whether or not that judicial determination made at the time of the filing of the petition was correct, and whether or not that judicial determination should stand.

Furthermore, the only logical and proper way to dismiss a petition because it was not filed in good faith, would be to set aside the order permitting its filing, which would in effect make the proceedings void **ab initio,** and raise grave doubts as to the legal effects of various actions taken under said proceedings before said order was set aside. Section 77-B has

ample provisions of dismissal of the petition without relating such dismissal back to the filing of the petition, and there is no reason to put such a strained and forced construction upon the Act.

An appeal from the order of the United States District Court permitting the filing of the petition under 77-B could only be taken by leave of the Appellate Court as provided in 24-b of the Bankruptcy Act. No such leave to appeal having been sought or obtained by the objecting creditor from the order of the District Court approving the filing of the petition, the Circuit Court of Appeals for the Sixth Circuit was without jurisdiction to set aside the order of the United States District Court holding that the petition was filed in good faith, and is without jurisdiction to hold that the petition of the Tennessee Publishing Company, Debtor, was not filed in good faith.

The Supreme Court of the United States has recently had occasion to hold that an appeal from an order dismissing or refusing to dismiss a petition under 77-B, lies only in the discretion of the appellate court.

> Meyer v. Kenmore Granville Hotel Co., U. S. Sup. Ct., February 3, 1936.
>
> Citing Campbell v. Alleghany Corp., 75 Fed. (2d) 947.
>
> See also St. Louis Can Co. v. General American Life Ins. Co., decided by 8th C. C. A., April 15, 1935, 77 Fed. (2d) 598.

The Tennessee Publishing Company, Debtor, filed its petition for reorganization under Section 77-B of the Bankruptcy Act on the 6th day of June, 1935. On that same date an order of court was entered sustaining the petition as filed in good faith. That order has never been set aside or vacated, and the district court specifically refused to set aside that order and hold that the petition was not filed in good faith.

One of the objecting bondholders sought and obtained from the District Court an appeal from the order of the District Court sustaining the petition as filed in good faith, but did not obtain leave of the Court of Appeals as provided in section 24-b of the Bankruptcy Act. Hence, the Circuit Court of Appeals was without jurisdiction to entertain this appeal. See Mayer v. Kenmore Granville Hotel Co., **supra.,** and properly dismissed the same.

The District Court dismissed the petition of Tennessee Publishing Company, Debtor, which dismissal had to be by the

terms of the Act under section b-8 of Section 77B of the Bankruptcy Act. Leave to appeal from this action of the United States District Court was obtained from the Circuit Court of Appeals, and the instant case is an outgrowth of said appeal. The Circuit Court of Appeals assumed that because the debtor corporation had made an appeal under section 24-b of the Bankruptcy Act from the order of the United States District Court dismissing the petition of debtor as provided in section b-8 of the Act, that it, the United States District Court of Appeals, had full jurisdiction to pass on and determine the correctness of the action of the United States District Court holding the petition filed in good faith.

We respectfully submit that the appeal of the debtor corporation is limited and that the entry of the order sustaining the petition as filed in good faith, and the refusal of the judge to set aside said order, is an entirely distinct and different action of the court from the dismissal of the petition under section b-8 of 77-B of the Bankruptcy Act. The court was acting under two different sections of the Bankruptcy Act. The rules and statutory provisions governing its actions in the two matters were entirely distinct, and the legal consequences which flow from its actions on the two matters were entirely distinct. An appeal from the court's action in one matter did not bring up for review its action in the other matter.

We respectfully submit that the Court of Appeals had no jurisdiction to inquire into or pass on the order of the United States District Court entered June 6, 1935, sustaining the petition as filed in good faith, or to review the exercise of discretion by the District Court in entering said order.

Furthermore, if the Circuit Court of Appeals had jurisdiction its action in holding the petition was not filed in good faith because no feasible plan was presented is totally unjustified by the record, and on the contrary it plainly appears that debtor with extreme diligence presented a thoroughly feasible plan of reorganization wherein and whereby debtor offered to pay in **cash** the entire value of the interests, claims, or liens of the creditors **as the same might be determined by the Court.** (R. 86—Filed October 15, 1935).

Again, eight days thereafter, on October 23, (R. 92) the debtor in order to meet the doubts expressed by the Court as to the constitutionality of its plan proposed an alternate plan offering the secured creditors eighty percent on the debts, or that said secured creditors be permitted to retain the lien on the property for the full amount now owed said secured creditors, asking only such reasonable time as the

Court might fix in order to pay said secured creditors in full whatever amount debtor corporation might owe them, with proper guaranties of ability to make said payment. Surely this last plan is clearly within constitutional limits as recently determined by this Court.

> Home Building & Loan Association v. Blaisdell 290 U. S. 398-483, 78 L. Ed. 413.

The judge of the District Court did not feel that the plans proposed were without merit, but based his decision solely on constitutional restrictions. (Oral opinion delivered by the Court October 15, 1935, R. 111)

The Circuit Court of Appeals at Cincinnati refers to debtor, "whose sole hope of financial salvation is an abiding faith in miracles." We respectfully submit that in spite of this opinion by the Court of Appeals a reliance by debtor on the constitutionality of an Act passed by the Congress of the United States is not an abiding faith in miracles and that the plans of reorganization proposed by the debtor were feasible and that the United States District Court was entirely correct in holding that the petition of debtor Tennessee Publishing Company was filed in good faith.

CONCLUSION

If the bonds in the principal sum of $750,000.00, on which there is now interest past due amounting to about $150,000.00, making a total of $900,000.00, are valid, this debtor is insolvent. The property covered by the mortgage executed to secure the bonds has been appraised by American Appraisal Company under appointment of the Court at $295,000.00. Its

unsecured debts amount to about $300,000.00 and its property not covered by the mortgage is worth much less than that sum.

A petition is pending in the equity cause of C. O. Carpenter, Receiver, v. Tennessee Publishing Company, filed by unsecured creditors attacking the validity of the bonds, and also questioning the amount due thereon, if held valid. This proceeding is undetermined. The proposition of purchase by Mr. Paul Davis is made subject to the terms and conditions in the deed of trust made by debtor to secure said bonds, with the right to make settlement of the purchase price by applying toward the payment thereof any outstanding bonds and maturing and unpaid interest coupons to the amounts to which such bonds and interest coupons would be entitled from a distribution among the holders of the bonds of the net proceeds of such sales after making the proper deductions for the costs and expenses of the sale. For the mortgaged property he offers to pay $400,000.00 in the manner stated. For the remainder of the unmortgaged property he offers to pay $40,000.00 in cash.

Debtors amended plan of reorganization filed October 15, 1935, "offers to pay in cash on such reasonable terms and conditions as the Court may fix, the entire amount of the appraised value of the property of the debtor corporation, as the same may judicially be determined by this Court, or the appraised actual cash value of all valid interests, claims, or liens on any of debtor's property when judicially determined. Said payment to be made into court or under such other arrangement as the Court may hereafter direct. Or the debtor offers to pay in cash under the conditions and terms set out above, the appraised value of the property as judicially determined by this Court, covered in the last appraisal of the American Appraisal Company, and described therein as "property covered by the mortgage and/or deed of trust," and to leave for liquidation in any manner termed suitable by the Court the remaining property of the Tennessee Publishing Company."

This amended plan complied with the provision of Section 77-B of the Bankruptcy Act, and was by the Court held to be proposed in good faith, but the trial Court ruled that the written consent of two-thirds of each class of creditors is a prerequisite to the acceptance and affirmance of the plan by the Court.

The Circuit Court of Appeals held that the entire provision, sub-section (b) (5) of Section 77-B is unconstitutional and

void, and that the consent of all the secured creditors is requisite to the confirmation of the plan by the Court.

Since the trial Court was of opinion that the consent of two-thirds of each class of creditors was necessary, debtor prepared and filed its third plan on October 23, 1935. (Record 93.) That plan provided that debtor would take over all its property and treat all the outstanding bonds as valid, and scale the bonded debt to eighty cents on the dollar of the principal sum, thus reducing the bonded debt to $600,000.00, which is twice the amount of the appraised value of the mortgaged property under the appraisal of the American Appraisal Company.

It is insisted on behalf of debtor that this proposition is workable, feasible, and hence in good faith.

This property is valuable as a going concern. Like a railroad, it cannot be sold or dealt with in piece-meal. Debtor proposes, under its third plan, to pay the interest three months in advance in cash, and to deliver to the Court $10,000.00 in cash for the first three months interest on the bonds. The interest on $600,000.00 bonds at 6% per annum would be $36,000.00, or $3,000.00 per month, and its offer was to pay this amount in cash into Court at once to be used for the payment of interest for the first three months after the adoption of the reorganization plan. It is also proposed that if debtor does not pay the interest on said bonds in advance for a period of ninety days that the whole of said outstanding issue shall mature and that the trust deed may be foreclosed under its terms. (Record 95). Debtor insists that this is an entirely fair and equitable protection of the property rights of the secured creditors and does not violate any of their constitutional rights.

E. W. Carmack, Jr., owner of the common stock of debtor, is an experienced and successful newspaper man, as is shown by the opinion of the District Court. (Record 114-115).

Respectfully submitted,

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In The

Supreme Court of The United States

No. 48.
October Term, 1936.

TENNESSEE PUBLISHING COMPANY,
PETITIONER,

vs

AMERICAN NATIONAL BANK, C. O. CARPENTER,
RECEIVER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF ON BEHALF OF PETITIONER TO BRIEF OF AMERICAN NATIONAL BANK, ET AL

LEWIS S. POPE,
WHITE & HOWARD,
ROBERTS & ROBERTS,
Attorneys for Petitioner.

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Attorneys for Petitioner.

REPLY BRIEF OF PETITIONER TO BRIEF OF APPELLEES

May it please the Honorable Court:

While two questions are discussed in our brief in support of the petition and two questions are discussed in the reply brief, viz: (1) the question of good faith of debtor, and (2) the constitutionality of sub-section (b) (5) of Section 77b, we respectfully submit that the question of good faith was not properly before the Circuit Court of Appeals and that its holding on that question is pure dictum and can have no effect in this Court. That is so because the Trial Judge in the District Court expressly found and held that the plan of reorganization was filed in good faith. (R. 114, 115, 116, 117) The Trial Court closes his opinion of almost three pages of the record by the statement:

> "I refer to these things to emphasize the fact that the petition, in my judgment, is filed in good faith."
>
> (Rec. 116)

The Court in its opinion said on page 116 of the record:

> "So, I find as a fact that the application is not only not in bad faith, but it is in good faith."

Following that statement is a recital of some of the provisions of one of the plans. The Trial Court said:

> "They (the debtor) also proposes, if the lien holders are unwilling to accept new security, for their debts, they will pay in cash, the value of the property covered by the mortgage, the value to be judicially determined by the Court. I have no reason to doubt that they can do just what they say they can do. * * * I certainly would not be justified at this time in finding that they are not financially able to carry out the proposals of the plans."
>
> (Rec. 116)

On October 15, 1935, debtor submitted its amendment to its plan of reorganization with respect to the manner of payment to bondholders and other creditors, which is as follows:

> "(1) The Debtor offers to pay in cash on such reasonable terms and conditions as the Court may fix, the entire amount of the appraised value of the property of the Debtor Corporation or the appraised actual cash value of all valid interests, claims or liens on any of debtor's property when judicially determined. Said payment to be

made into court or under such other arrangement as the Court may hereafter direct.

Or if the Court so direct,

(2) The Debtor offers to pay in cash under the conditions and terms set out in paragraph (1) above, the appraised value of the property as judicially determined by this Court, covered in the recent appraisal of the American Appraisal Company and described therein as "Property covered by the mortgage and/or deed of trust," and to leave for liquidation in any manner deemed suitable by the Court the remaining property of the Tennessee Publishing Company.

(3) This amendment to the plan of reorganization heretofore filed in this cause shall, if the Court so order, supersede and supplant all provisions in any plans of reorganization heretofore submitted by the Debtor, insofar as said plans of reorganization may be in conflict herewith, but no further or otherwise."

(Rec. 86)

It will be noted that the Trial Judge referred to the fact in his opinion that debtor offered to pay cash and said that he had no doubt of the financial ability of debtor to comply with that proposition. There is certainly nothing incomprehensible about this proposition. It will be observed that debtor offered to pay cash for the property of Tennessee Publishing Company as the value of same might be judicially determined by the Court. Second, or in the alternative, to pay in cash the "appraised actual cash value of all valid interests, claims, or liens of any kind on debtor's property when judicially determined." We respectfully submit that this language is plain, clear, and unambiguous. Debtor proposed that the Court should do either one of two things: (1) Appraise all of the property of debtor and debtor would pay cash into Court in the amount so fixed; (2) or that the Court should appraise the value of all valid interests, claims or liens of any of debtor's property (which, of course, would include the bonds) and when the appraised value of the bonds was fixed that debtor would pay that amount in cash into Court. There is certainly nothing indicative of an effort to exploit the corporation nor that the effort to reorganize is made "by visionaries whose illusory and optimistic imaginations outrun their business judgments," (Rec. 157), as suggested by the Circuit Court of Appeals. Neither is there anything indicating that the plan is not feasible or workable, because the payment of cash into

Court and its distribution by the Court to those to whom it is adjudged to be entitled is the simplest sort of proposition and so far as the objecting bondholders are concerned, the plan is already consummated and the question of feasibility or workability does not enter into it. The mortgaged property has been appraised at approximately $295,000.00. If the bonds issued and outstanding are valid, there is something like $900,000.00 due, both principal and interest, thereon. So that the bondholders would receive something over thirty cents on the dollar if the property should be adjudged by the Court to be of its present appraised value.

It is set out by debtor that one block of the bonds of the amount of $60,000.00 was bought at twenty-five cents on the dollar after the receivership bill was filed in this case, and that Mr. Paul M. Davis claims to have bought or optioned $250,000.00 of the bonds, and only claims to have paid, or agreed to pay eighty cents on the dollar, and that he undertook to acquire same long after the receivership case was brought and after different hearings under the petition in this case; also that American National Bank, of which Mr. Davis is president, holds $210,000.00 of these bonds which it took over from Fourth & First National Bank of Nashville under some plan of consolidation of the two banks, and that nothing like the full face value of the bonds was paid therefor, or credits taken therefor, and that not exceeding thirty cents on the dollar of the face value of said bonds was paid by said bank. Also that all the other outstanding bonds were bought at much less than the face value, or only held as collateral to secure indebtedness, and that some of them have changed hands since the debtor was known to be insolvent. (Rec. 97-8)

The inconsistency of the argument of adversary counsel that this plan of reorganization is not feasible or workable because the papers are now losing money in receivership and that they cannot be made to earn a substantial amount, and at the same time pretending that Mr. Paul M. Davis has offered $440,000.00 for the assets of the debtor, is quite noticeable. We shall discuss Mr. Davis's offer further on in this brief.

TWO PROPOSITIONS OF LAW SUBMITTED:

I. THE QUESTION OF GOOD FAITH OF THE DEBTOR WAS NOT BEORE THE UNITED STATES CIRCUIT COURT OF APPEALS. IT HAD NO JURISDICTION TO PASS ON THIS QUESTION.

This case was heard in the appellate court on petition to superintend and revise. (See debtor's petition, Record 139 et seq., and order sustaining same, R. 138.) The petition for leave to appeal was under Section 24B of the Bankruptcy Act. This is the only method by which this case could have been reviewed by the appellate court. It is a "Proceeding in Bankruptcy" which may only be appealed under Section 24B on petition to superintend and revise in matter of law, and is not a "Controversy" arising under Section 24A of the Bankruptcy Act.

The opinion of this Court in **Taylor v. Voss** 271 U. S. 176 is decisive of this question. Under the opinion in that case the appellate court had no authority or jurisdiction to pass upon any question not raised in the petition to superintend and revise. The question of good faith was not raised in that petition, for the reason that the District Judge had decided the question in favor of debtor. (Rec. 124) The only question raised in the petition is that of the constitutionality of Section 77B of the Bankruptcy Act, which is pertinent to a decision of this case.

While our second assignment of error in this Court does not directly call attention to this precise point of want of jurisdiction in the appellate court, we desire now to call the Court's special attention thereto, and, if necessary, to be allowed to amend so as to make that precise point. We respectfully call the Court's attention to the order of the appellate court, which is as follows:

> "On consideration whereof, it is here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed."
>
> (Rec. 147)

The decree of the District Court shows that the case was heard on the motions to dismiss the debtor's petition and plans of reorganization, and after argument of counsel, and due consideration thereof,

> "The Court is of the opinion that said petition and the plans presented therein and thereby should be dismissed,

except upon the ground that the petition was not filed in good faith, which ground of the motion is overruled, and for the reasons set out in the opinions of the Court which are filed in this cause and ordered to be made a part of the record and a part of this decree," etc.,

it is ordered that the petition of debtor and the various plans of reorganization be dismissed. (Rec. 124)

So that, on the face of the record the appellate court does not modify or change the decree of the District Court. However, in the opinion filed by the appellate court, the question of good faith is considered and it is said that

"The plan fails to meet the statutory test."

(Rec. 157)

The brief filed by adversary counsel seems to overlook the real situation. Debtor filed its petition for reorganization on June 6, 1935. (Rec. 2) An order was entered by the District Court reciting that

"The Judge being satisfied that such petition complies with Section 77B of the Bankruptcy Act, being Title II, section 207, U.S.C.A., and has been filed in good faith, it is ordered, adjudged and decreed, that said petition is hereby approved as properly filed under Section 77B of the Bankruptcy Act. (R. 1).

Thereafter, and on July 13, 1935, debtor filed its first plan of reorganization. (R. 34) Later, on August 31, 1935, debtor filed its supplement to said plan which is called in the record the second plan. (R. 40) On October 14, 1935, debtor filed another petition. (R. 79) On October 15, 1935, it filed an amendment to said last named plan. (R. 86) On October 23, 1935, it filed its third and last plan of reorganization in an effort to meet the views of the District Court. (R. 93) On October 25, 1935, debtor filed an amendment to the last plan of reorganization. (R. 109)

These plans and amendments thereto were considered by the Court upon the motions of American National Bank and others to dismiss the same, which motions appear as follows:

The answer of American National Bank concludes with the following:

"Your respondent therefore moves the Court to dismiss the petition for the reason that it was not filed in

good faith, as shown by the facts and circumstances hereinabove set out."

(Rec. 18-27)

O. H. Ingram and J. C. Bradford, claiming to own $60,000.00 face value of the bonds, answered the petition for reorganization but did not include therein a motion to dismiss. (R. 27)

American National Bank filed its amended and supplemental answer and motion on October 7, 1935. (R. 51) This pleading closes with the following:

"Wherefore, for the reasons shown in this amended and supplemental, as well as those shown in its prior answer, this creditor here and now moves the Court to dismiss said petition as not being filed in good faith for the reasons heretofore shown."

(R. 56)

Messrs. Ingram and Bradford filed another response to subsequent plans, in which no motion to dismiss appears. (R. 98)

Motion of Paul M. Davis (R. 101)

Objections and Motion of American National Bank (Rec. 106)

It will be observed on an inspection of these motions that they are what might be termed "speaking motions." These motions undertake to set up, by way of answer, alleged facts which would make it proper for the Court to dismiss the petition and plans. Since the Trial Court acted on the petition of debtor and the plans of reorganization submitted by it and upon the motions to dismiss same, it was restricted and limited to the facts set out in the petition and in the plans of reorganization. The brief of adversary counsel assumes that the Trial Court as well as the appellate court considered the questions of fact set up in the answers, which could not properly be so considered. A motion to dismiss fills the same office as a demurrer and admits as true the allegations of the affirmative pleading sought to be dismissed. This is elementary.

Furthermore, the position taken by adversary counsel that there is a concurrent finding of the district court and the appellate court that the petition was not filed in good faith is wholly unjustified on this record. There was no such concurrent finding. On the contrary, the District Court in its

order, as heretofore shown, expressly states that the motion to dismiss on the ground of want of good faith is not sustained. (Rec. 124) The order of the District Judge shows that the ground of the lack of good faith is overruled. The first opinion of the District Judge appears in the record at pp. 111-120. It is there said that the motion is sustained and the petition is dismissed under the authority of **Bank v. Radford**, 295 U. S. 555. (R. 120) This oral opinion was delivered on October 15, 1935, after which debtor filed its third plan. Again on October 23, 1935, the Court filed a supplemental memorandum opinion in which he discussed the plan filed on October 23, in which opinion the gist thereof is that the Trial Court considered a sale of its property inevitable, because of the opinion of this Court in the Radford case. The Court concludes the opinion with this language:

> "If two-thirds of the secured creditors should agree to the plan, it would not deprive the minority of a property right for the Court to approve same. But, if none of the secured creditors are willing to accept the plan, and the Court should, notwithstanding, approve it, it would be depriving them of substantive rights in property, and would, therefore, be violative of the Fifth Amendment.
>
> I can see no alternative except to dismiss the petition, and let the property be sold in the equity case."
>
> (R. 123)

This opinion was delivered and filed on October 23, 1935, and the final order and decree was entered on October 25, 1935, following the filing of the written memorandum. (R. 124)

II. SUBDIVISION (B) (5) OF SECTION 77B OF THE BANKRUPTCY ACT IS CONSTITUTIONAL.

ARGUMENT AND AUTHORITIES

The Constitution of the United States, in Article 1, Section 8, Clause (4), provides:

> "The Congress of the United States shall have power, (4) to establish an uniform rule of Naturalization, and

uniform Laws on the subject of Bankruptcies throughout the United States."

Under this provision of the Constitution, it has been held that there was no doubt about the right of Congress to pass a Bankruptcy Act and that when such Act was passed, all State Acts upon the subject of bankruptcy or insolvency wherein discharges were granted to debtors were suspended.

International Shoe Company v. I. Pinkus, et al, 278 U. S. 261.

This Court, in case of **Mueller v. Nugent**, 184 U. S. p. 14, says:

> "It is as true of the present law as it was of that of 1867, that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction and on adjudication title to the bankrupt's property became vested in the trustee with actual or constructive possession, and placed in the custody of the bankruptcy court.'

The Bankruptcy Act of 1867, as amended by Act of Congress of 1874, for the first time provided for a composition between the bankrupt and the creditors. That Act, however only related to a composition as between the bankrupt and the unsecured creditors.

The constitutionality of that amendment was attacked on the ground that it violated the Fifth Amendment to the Constitution, but the Act was held constitutional In Re Reiman, Fed. Cases No. 11673, thereafter affirmed in Fed. cases No. 11674. The above decision was referred to with approval by this Court in **Hanover National Bank v. Moyses**, 186 U. S. 187, and likewise cited with approval in **Continental Illinois Bank & Trust Company v. C. R. I. & P. Railroad Company**, 294 U. S. 672.

Thereafter, the Bankruptcy Act of 1898 was passed and the constitutionality of that Act was attacked because it extended to others than traders, provided for exemptions according to the laws of the resident State of the bankrupt and discharge of the bankrupts. It was attacked on the ground that the exemptions were not uniform in the several States throughout the Union, therefore, the Act was unconstitutional as not being uniform. This Court decided in **Hanover National Bank v. Moyses,** 186 U. S., 181, that the Act of 1898 was constitutional.

The Bankruptcy Act of 1898, in Section 12, provides for a composition as between the bankrupt and the creditors. This

section provides that the bankrupt might effect a composition with his unsecured creditors and in event a majority accept the composition proposed, that the same shall be confirmed by the Court, provided the Court determines it to the best interest of the creditors and the bankrupt has not violated other provisions of the Act. This Act was held constitutional and this Court has approved the constitutionality of the holdings of the lower courts on this subject in several cases. Under the Act of 1898, this Court held that a Court of Bankruptcy had the power to order the sale of incumbered property of the bankrupt, free from incumbrances, and, in **Van Huffel v. Harkelrode**, 284 U. S., p. 277, says:

> "The present Bankruptcy Act, (July 1, 1898, 30 Stat. at L.544, chap. 541, U.S. C. title 11, No. 1), unlike the Act of 1867, contains no provision which in terms confers upon bankruptcy courts the power to sell property of the bankrupt free from encumbrances. We think it clear that the power was granted by implication. Like power had long been exercised by federal courts sitting in equity when ordering sales by receivers or on foreclosure. **First National Bank v. Shedd**, 121 U. S. 74, 87, 30 L.ed. 877, 882, 7 S.Ct. 807; **Mellen v. Moline Malleable Iron Works**, 131 U.S. 352, 367, 33 L. ed. 178, 183, 9 S.Ct. 781. The lower federal courts have consistently held that the bankruptcy court possesses the power, stating that it must be implied from the general equity powers of the court and the duty imposed by No. 2 of the Bankruptcy Act to collect, reduce to money and distribute the estates of bankrupts, and to determine controversies with relation thereto."

To the same effect is **Isaacs v. Hobbs Tie & Timber Company**, 282 U.S. 734.

Thereafter, March 3, 1933, the Congress of the United States amended the bankrutcy act of 1898 by adding thereto Section 74 and by such amendment provided that any person, except a corporation, might file a petition or an answer, stating that he is insolvent or unable to meet his debts as they mature, and that he desires to effect a composition or an extension of time to pay his debts.

This amendment provides for the scaling of both secured debts and unsecured debts, or extension of time for payment thereof, by agreement between the bankrupt and creditors; and further provides that a composition might be confirmed after it was accepted in writing, by a majority in number of all creditors whose claims, if unsecured, shall have been al-

lowed, or if secured, or proposed to be affected, by an extension proposal, must represent a majority of amount of such claims.

This section of the Act was held constitutional in the case of **In Re Lindquist**, 70 Fed. (2d) 929, the Court holding that Congress had full power to legislate upon the subject of bankruptcy with respect to all classes of creditors, both secured and unsecured.

On March 3, 1933, Congress also amended the Bankruptcy Act by adding thereto, Section 77, providing for the reorganization of Railroad corporations. That section deals with the readjustment of debts, both secured and unsecured, of railroad corporations and provides for compositions and extensions of indebtedness and the scaling of indebtedness both secured and unsecured. The provisions as to acceptances by the creditors and the confirmation by the Court are very similar to the provisions in Section 12 and Section 74; save and except that in reference to railroad reorganization it must be submitted to the Interstate Commerce Commission for approval, but much wider latitude is given to the Judge in confirming the composition than was given under Section 12 or Section 74, because provisos are in the Act under which the Judge can confirm where the requisite majority do not accept the proposed reorganization, and this same power is in subdivision (b)(5) of 77B.

The constitutionality of Section 77 was before this Court in the case of **Continental Illinois Bank & Trust Company v. C. R. I. & P. Railroad**, 294 U.S., 678, and this Court in an exhaustive opinion held such Act constitutional.

On June 7, 1934, by Act of Congress, the Bankruptcy Act was further amended by the addition of Section 77A and Section 77B. Up to the time of the passage of this amendment there was no provision whatsoever for the reorganization of a corporation, or the extension of its indebtedness, other than railroad corporations, hence Congress, in its wisdom, realizing the economic situation, passed this Act by adding Sections 77A and 77B to the Bankruptcy Act. The purpose of this amendment is stated in Section 77A as follows:

> "In addition to the jurisdiction exercised in voluntary and involuntary proceedings, to adjudge persons bankrupt, Courts of bankruptcy shall exercise original jurisdiction in proceedings for relief to debtors as provided in Section 77B of this Act."

Section 77B provides:

"(a) That any corporation which could become bankrupt under Section 4 of the Act and any railroad corporation or other transportation corporation except a railroad corporation, authorized to file a petition under Section 77, may file an original petition or answer for corporate reorganization under this section."

The Circuit Courts of Appeals have passed upon the constitutionality of Section 77B in the following cases.

Campbell v. Allegheney Corporation, 75 Fed. (2d) 947, (certiorari denied, 59 Sup. Ct. 104), in which the Court said:

"77B was passed for the purpose of giving an opportunity to an embarrassed corporation made necessary by economic depression and its purpose should be forwarded by a fair and liberal construction, and not thwarted by a narrow or technical interpretation.

Section 77B of the Bankruptcy Act requiring secured creditors of a corporation to scale their debts in accordance with a plan which two-thirds of them are willing to accept and which has been approved by the Court as reasonable and fair, and accept in lieu of money such securities as are specified in the plan, is not such an arbitrary and unreasonable exercise of the bankruptcy power as to amount to a denial of due process.

The fact that secured debts are affected by the corporate reorganization amendment to the Bankruptcy Act (77B) does not affect its constitutionality.

Like other constitutional grants of power, that giving Congress power over bankruptcies is to be interpreted not in the light of the conditions with which the framers of the Constitution were familiar, but of what is required under modern conditions to deal adequately with the relationship existing between embarrassed debtors and their creditors."

The Section was also held constitutional **In re Central Funding Corporation**, 75 Fed. (2d) 256, in which the Court, at p. 261, says:

"Section 77B and the plan proposed under it do not

violate the Fifth Amendment, either with respect to due process or otherwise.

In **Gilfillan Union Canal Co.,** 109 U.S. 401, 3 Sp. Ct. 304, 27 L.ed. 977, a special act of the state of Pennsylvania, whereby a plan to refund a corporate indebtedness through an issue of new securities was to be binding on bondholders who did not file their dissents within three months, was held not to impair the obligation of contracts. Similarly in **Canadian Southern R. Co., v. Gebhard,** 109 U. S. 527, 3 S. Ct. 363, 27 L.ed. 1020, a Canadian statute provided for a reorganization upon the consent of two-thirds of the stock and three-quarters of two classes of bonds by an exchange of bonds secured by a new mortgage for former securities. The Supreme Court said, at p. 536 of 109 U.S. 3 S. Ct. 363, 369: 'In no just sense do such governmental regulations deprive a person of his property without due process of law.' The New York Court of Appeals, in sustaining a reorganization under the Schackno Act (Laws 1933, c. 745, as amended), reached a similar conclusion. Matter of People by Van Schaick v. Title & Mortgage Guarantee Co., 264 N.Y. 79, 190 N.E. 153. Our decision in Matter of Allied Owners Corporation, Debtor, 74 F. (2d) 201, on December 10, 1934, and in Re Prudence Bonds Corp. (Ex parte Radin), 75 F. (2d) 262, handed down herewith, each dealt with section 77B and are also to the same effect. The proposed plan provides a fair equivalent for any rights the bondholders have lost. Such a deprivation is not more than what is in substance involved in any bankruptcy administration and in no way transcends the Fifth Amendment."

The same Section was also held constitutional by the Circuit Court of Appeals in **Re New Rochelle Coal & Lumber Company**, 77 Fed. (2d) 881, and in that case the Court said:

"Section 77B does not require a guarantee of the payment of debts or bonds of the corporation."

In that case an extension and readjustment was proposed and confirmed.

In none of the above cases was the constitutionality of subdivision (b)(5) expressly raised or passed upon, but in the case of **Campbell v. Alleghaney Corp.**, 75 Fed. (2d) 954, the Court said:

"The act is based upon an equitable recognition of the

rights of all who have an interest in a common property, and is in accord with the principle under which courts of equity have denied to dissenting creditors the right to prevent the consummation of a plan of reorganization which has been found to be fair and open to all creditors on the same terms. See **Fearon v. Bankers Trust Co.** (C.C.A. 3d) 238 F. 83; **Simon v. New Orleans R. Co.** (C.C.A. 5th) 242 F. 62. It embodies substantially the same principles of corporate reorganization adopted in England and Caanda many years ago, and, as shown above, held reasonable by the Supreme Court in the case of **Canadian Southern Ry. Co. v. Gebhard**, 109 U. S. 527.

The Circuit Court of Appeals, in the case of **Downtown Investment Association v. Boston Metropolitan Buildings**, 81 Fed. (2d) 322, says:

"Appellant further contends that the debtor's plan is not a proper plan in that it (1) extends the maturity of the bonds for eight years; (2) it requires them to release all unpaid interest to July 1, 19.... (3) gives them after July 1, 1934, fixed interest of only 3 percent and an additional 1 percent if earned, and after the payment of 1 percent to the holders of the second mortgage bonds a final 1 percent if earned; (4) the sinking fund requirements of the present mortgage are to be waived temporarily; (5) the mortgage is to be subordinated to a proposed lease.

Authorization for these so-called objectionable features of the plan may be found in 77B, cl.(b), which provides that a plan of reorganization may include provisions modifying or altering the rights of creditors generally or of any class of them secured or unsecured, either through the issuance of new securities of any character or otherwise; may include provisions modifying or altering the rights of stockholders or any class of them; and shall provide adequate means for the execution of the plan which may include the transfer of all or any part of the property of the debtor to another corporation; may provide for the retention of the property by the debtor the distribution of assets among creditors of any class thereof; the satisfaction or modification of liens, indentures, or other similar instruments; the curing or waiver of defaults; the extension of maturity dates of outstanding securities; the change in interest rates and other terms of such securities; the issuance of securities of either the debtor or any such corporation or corporations for cash, or in exchange for existing securities or in sat-

isfaction of claims or rights or for other appropriate purposes and may include any other appropriate provisions not inconsistent with the Act.

It thus appears that all these features of the plan objectionable to the first mortgage bondholders appear to be authorized by the statute."

It will be thus seen that while the Circuit Courts of Appeals have not singled out subdivision (b) (5) as to its provisions, yet, nevertheless, those Courts have held 77B constitutional and the language used in their decisions can lead to no other conclusion than that in their opinion, subdivision (b)(5) is within the power of Congress when legislating upon the subject of bankruptcy.

The power given in (b) (5) is a power exercised for many years by equity courts in reference to receivership proceedings and reorganization proceedings of railroad corporations. In case of **Phipps v. C. R. I. & P. Ry. Co.**, 284 Fed. 945, the Court held:

"Where a decree approving reorganization of an insolvent railroad company secured or offered to unsecured creditors their just and equitable shares of the beneficial interests in the reorganized corporation, the court may lawfully enjoin enforcement of claims of such creditors by execution against the property, or otherwise than as provided in the decree.

It is not essential to the valid reorganization of an insolvent railroad company, in accordance with a plan approved by a large majority of its general creditors and also of its stockholders that its property should be transferred to the reorganized corporation through the medium of a judicial sale."

In case of **Palmer v. Bankers Trust Company**, 12 Fed. (2d) 747, in which case the Denver and Rio Grande Railroad Company had a reorganization, it was provided that the property be sold to a new company and that it should issue general mortgage bonds, secured by a mortgage on the property of the new company, and also preferred stock, and that the exchange should be on the basis of Seven Hundred and twenty-five ($725.00) Dollars, general mortgage bonds, and Four Hundred ($400.00) Dollars par value, preferred stock for each one Thousand ($1000.00) Dollars refunded or adjustment

bonds taken up. The plan was approved by a large majority of the bondholders.

It was opposed by Palmer, who endeavored to get a foreclosure on his bonds or a payment therefor. The Court, in passing upon his contention, at p. 754, said:

> "While a court of equity will not allow minority bondholders to be disregarded or unfairly treated in a reorganization plan, yet on the other hand, it will not lend its aid to a scheme by a minority bondholder of holding up a fair reorganization plan, solely as a means for obtaining greater value or more favorable terms for his bonds than are to be given by the plan to the great majority of the bondholders. **Especially is this true if it should appear that the minority bondholder has bought his bonds pending the reorganization and for the purpose of speculating thereon.**"

This court, in case of **Louisville Joint Stock Land Bank v. Radford**, 295 U. S. 555, when considering the constitutionality of the Frazier-Lemke amendment to Section 75 of the Bankruptcy Act by adding subsection S to Section 75, which subsection this court held unconstitutional, at pp. 585-586, said:

> "So far as concerns dissenting creditors, the composition is a method of adjusting among creditors rights in property in which all are interested. In ordering the adjustment, the bankruptcy court exercises a power similar to that long exercised by courts of law. **Head v. Amoskeag Mfg. Co.**, 113 U. S. 9, 21, 28 L.ed. 889, 893, 5 S. Ct. 441, and of admiralty. The **Orleans v. Phoebus**, 11 Pet. 175, 183, 9 L. ed. 667, 680. It is the same power which a court of equity exercises when it compels dissenting creditors, in effect, to submit to a plan of reorganization approved by it as beneficial and assented to by the requisite majority of creditors. **Shaw v. Little Rock & Ft. S. R. Co.**, 100 U.S. 605, 25 L.ed. 757; **Kansas City Terminal R. Co. v. Central Union Trust Co.**, 271 U.S. 445, 70 L. ed 1028, 46 S. Ct. 549; (Compare **National Surety Co. v. Coriall**, 289 U.S. 426, 77 L.ed. 1300, 53 S. Ct. 678, 88 A.L.R. 1231). **First National Bank v. Flershem**, 290 U.S. 504, 78 L.ed. 465, 54 S. Ct. 298, 90 A.L.R. 391. In no case of composition is a secured claim affected except when the holder is a member of a class; and then only when the composition is desired by the requisite majority and is approved by the court."

The reason that the Court held subsection (s) of Section

75 of the Bankruptcy Act unconstitutional was that the Section was not at all comparable to a composition, and the Court said:

> "Never, so far as appears, has any composition affected a secured claim held by a single creditor. Compositions are comparable to the voluntary adjustment with the Mortgagee provided for in section 3 of the Frazier-Lemke Amendment. They are not analogous to the so-called adjustment compelled by Section 7."

The Court, however, in **Louisville Joint Stock Land Bank v. Radford**, specifically held that the Frezier-Lemke Act was not a Bankruptcy Act and did not comply or comport with the provisions relative to bankruptcy, hence, that where Congress legisalted, even though it named the subject bankruptcy, if it was not in truth and fact a bankruptcy act, and violated other sections of the Constitution, the power to legislate upon the subject of bankruptcy did not give Congress the power to violate the Fifth Amendment to the Constitution, or any other section of the Constitution, but the Radford case distinctly upholds the right of Congress to legislate upon the subject of bankruptcy and provide for the scaling of debts thereby.

The purpose of writing subdivision (b)(5) into the law, as well as subdivision (b)(4), was to give the Courts in Bankruptcy proceeding a power that had not heretofore existed in a Court of Bankruptcy. If (b)(5) be unconstitutional, then Section 77 as to its corresponding subdivisions is unconstitutional.

Courts of equity had, in reorganization proceedings, forced by judicial decree the will of the majority upon the minority, where to do so was doing equity as between the persons of the same right and the same class. That power had long been exercised and the cases are cited in Judge Brandeis' opinion in the Radford case, upholding this power and the length of time for which it has been exercised. Consequently, when Congress was passing an act for the relief of debtors and for the purpose of rehabilitating rather than liquidating, it intended to give to Courts of Bankruptcy, first, all powers that a court of equity could exercise in a receivership proceeding, and it specifically so wrote it in the Act, and in order that recalcitrant creditors could not deprive a Court of its power, and when a plan which a debtor and its creditors had worked out for mutual advantage, and the best interest of all, was before the Court, that the Court could confirm that plan and

prevent a recalcitrant or scheming creditor from preventing the approval and confirmation of such plan. Hence, it was expressly provided that the Court had power to approve and confirm a plan, even though two-thirds of the creditors of each class had not accepted, and prevent some creditors from blocking the plan, or from seeking to obtain greater value or more favorable terms for their bonds or debts than is proposed by the plan to be given to the bondholders or creditors of each class.

It is true that subdivision (b)(5) provides for adequate protection for the realization of the value of the interest, claims or liens of each class of such non-consenting creditors exceeding one-third.

We cannot help but believe that Judge Simon has misapprehended what this Court held in case of **Louisville Joint Stock Land Bank v. Radford**, because if Section 12 of the Act is constitutional, and Section 74 of the Act is constitutional, and Section 77 of the Act is constitutional, and a composition or reorganization can be effected where a majority of each of the classes accept the composition or reorganization, then if the will of a majority can be enforced on the one third, or minority, of non-consenting creditors, that is as much a deprivation of property of the one-third as it would be if the **Court** was authorized to confirm a plan where less than two-thirds of each class accpeted. **In other words, whether one man of a class has his claim scaled or one hundred have their claims scaled, there can be no fine spun distinction between the deprivation of property as to the one or the one hundred.**

Judge Simon failed to consider the distinction between (b) (5) of 77B and sub-section (s) of 75; (b) (5) relates to classes and provides for equality; (s) of Section 75 relates to only one class—mortgagees; and did not provide for equity or equality, so far as the rights of debtor and mortgagee are concerned.

We are not unmindful of the decision of Judge Hand **In Re Murel Holding Corporation,** 75 Fed. (2d), 941, in which, as to Section 77B, subdivision (b) (5) (d), he says:

> "The last is not, properly speaking, a method at all; it merely gives power generally to the Judge, equitably and fairly to provide such protection, that is adequate protection, when other methods are not chosen * * * * * * It is plain that adequate protection must be complete compen-

sation and the payment ten years hence is not, generally speaking, the payment now."

In the case before Judge Hand, his decision was unquestionably correct on the facts and we fully agree that subdivision (b) (5) (d) is not a method, but it is certainly a power and jurisdiction given to a Judge in a bankruptcy proceeding and it was evidently given for a purpose, so that the Court could have all the powers formerly exercised by courts of equity in reorganization proceedings in reference to dealing with recalcitrant creditors or scheming minorities, or individuals.

We concede the adequate protection for the realization of the value of the interest, claims, or liens of the creditors of each class must be completely compensatory, but what is completely compensatory under (b) (5) (d) is to be determined by the Court, and his opinion is the determining factor under the law. His opinion is, of course, subject to review and in event it be held he erred in that regard the case may be reversed, but that does not make that subdivision of the Act unconstitutional.

In the next to the last paragraph of the subdivision (b), Congress provided:

> 'That the Judge shall scrutinize and may disregard any limitations or provisions of any depository agreements, trust indentures, committee **or other authorizations affecting any creditor acting under this section and may enforce an accounting thereunder or restrain the exercise of any power which he finds to be unfair or not consistent with public policy** and may limit any claims filed by such committee member or agent, to the actual consideration paid therefor."

Hence, it will be seen that the power given the Judge by the language "or restrain the exercise of any power which he finds to be unfair or not consistent with public policy," certainly meant something. It evidently was intended to let the Judge determine whether a plan provided adequate protection for the realization of the value of the interest, claim or liens of creditors, and in event he did so, the power was given to confirm a plan.

In other words, the opinion of the Court that a plan is fair, feasible and equitable, that it provides adequate protection for the non-consenting creditor of each class is conclusive and the Court has the power to say this plan is in the interest of

all; your security is adequately protected; you have the same right of security and realization that other creditors of the same class are given under this plans. and you are deprived of nothing in the rehabilitation of this corporation.

Subdivision (b), clause (5) (d): "By such method as will in the opinion of the Judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection," was certainly intended to have some meaning and give some power to the Judge to control the action or scheming, grasping or recalcitrant creditors.

We admit (b) (5) (d) is not a plan, but it certainly gives the Judge power to act. In other words, it gives the Court the power in a reorganization to prevent extortion or prevent a sacrifice of debtor's property by foreclosure because one lien creditor or a group of lien creditors desire foreclosure so they may acquire that property under forced sale and prevent a debtor from paying its creditors their just debts and at the same time save the equity, if any, in its property for its stockholders, as was held by Judge Boynton in Waco Development Company case.

A full discussion on this subject will be found in Bankruptcy Reorganizations under 77B, by Judge Johnson, Section 603, pp. 517-519.

In **Re: Island Park Associates,** 77 Fed. (2d), 334, the Court says:

> "The purpose of the Act is to avoid immediate liquidation of the property involved in the reorganization of a corporation and its subsidiaries with a view to rehabilitate rather than liquidate."

In **Re Allied Owners Corporation,** 74 Fed. (2d), 1. c. 204, the Court says:

> "Section 77B is concerned with corporate reorganization. Its principal purpose was to provide relief against recalcitrant minority creditors or debtors unable to reach all creditors."

In **Campbell v. Allegheny Corporation,** 75 Fed. (2d) 974, (Certorari denied, 59 Sup. Ct. 104) the Court says:

> "77B was passed for the purpose of giving an opportunity to an embarrassed corporation made necessary by

economic depression and its purpose should be forwarded by a fair and liberal construction, and not thwarted by a narrow or technical interpretation, and certainly by not reading into its language conditions and limitations which the lawmakers did not see fit to express."

In **Re Consolidated Coal Co.,** 11 Fed. Supp. 594, the Court said:

"There being no similarity between Section 77B and Section 75 (s), the decision of the Supreme Court holding the latter unconstitutional does not indicate that Section 77B is also invalid."

Bankruptcy Acts must provide equality as between creditors of each class, and when so drafted, then Congress has only exercised the power given it under the Constitution and an Act so drafted forcing an objecting creditor to accept the same treatment accorded creditors of the same class who accept, or to accept just compensation for their claims or liens, does not violate the Fifth Amendment, or any other provision of the Constitution.

THE PAUL DAVIS BID

While we think the reference to the bid of Mr. Paul Davis of $400,000.00 for the property covered by the trust deed and $40,000.00 for the other property belonging to debtor si wholly immaterial, nevertheless we desire to call the attention of the Court to the attiude of Mr. Davis in this case. Reference to his bid appears on page 13 of the brief of adversary counsel. It is there stated that Mr. Davis offered to purchase the properties covered by the bond mortgage "and to pay the sum of $400,000.00 therefor and to pay an additional sum of $40,000.00 for the assets not covered by the bond mortgage."

As stated in that brief this statement is very misleading. His offer appears in the record at page 100A. An examination of that offer shows that it is made upon the following conditions, to-wit:

1. "Said offer is made especially subject to all of the terms, conditions and provisions contained in the above mentioned deed of trust from Tennessee Publishing Company to the trustees;"

2. It is made subject to the right to make settlement by applying towards the payment of the purchase price, and to be

credited thereon, any outstanding bonds and maturing and unpaid interest coupons to the amounts to which such bonds and interest coupons would be entitled upon a distribution among the holders of the bonds of the net proceeds of such sales after making the proper deductions for the costs and expenses of the sale.

3. Said offer is made conditionally as follows: That "In the event the court shall order all the properties and assets of Tennessee Publishing Company sold in this cause under the terms and subject to the provisions of the aforementioned deed of trust, such order to be entered herein within thirty days from the date of filing of this offer," etc.

4. Upon the condition that the report of Byrd Douglas, standing master, filed on March 20, 1935, be confirmed by the Court "with respect to the lien of said deed of trust and the properties and assets covered thereby." In other words, that the Court adjudge these outstanding bonds to be valid and legal to the extent of the full amount.

On September 13, 1935, debtor filed its petition to stay further proceedings until it should be determined in the receivership case whether or not said bonds are valid. In paragraph III of said petition it is alleged,

> "Petitioner would further show to the Court that recently a petition has been filed in the case of C. O. Carpenter, receiver, v. Tennessee Publishing Company by certain unsecured creditors of petitioner, in which petition said unsecured creditors are raising very serious questions as to the validity of certain bonds or secured claims which have been filed and undertaken to be proven in said receivership case, and are included in the report filed by the master therein." (R. 49.)

Nowhere in this record is that allegation denied, said report of the standing master in the receivership case has never been confirmed, and said cause now stands on the report and on the petition of unsecured creditors challenging the validity of debtor's bonds, and the alleged offer of Mr. Davis is conditioned upon the dismissal of said petition and the affirmance of the report of the special master.

It is also worthy of special mention that in the answer filed by American National Bank the ownership of the outstanding bonds is stated, among which is Canal Bank & Trust Company, $250,000.00 (R. 19). Mr. Davis filed his intervening pe-

tition in the case in the nature of an offer, on October 25, 1935, in which he says:

> "Petitioner has recently acquired the debtor's bonds, formerly held and owned by Canal Bank & Trust Company, in the principal sum of $250,000.00, being Bonds Number 1 to 250, inclusive, with interest coupons thereon at six and one-half per cent from November 1, 1932."

In other words, this record shows that long after the petition for reorganization was filed by debtor on June 6, 1935, Mr. Davis made some kind of deal (not disclosed on the record) with Reconstruction Finance Corporation, and then came into this Court and sought to block the reorganization plans of debtor.

We insist the same rule should apply to a purchaser under such circumstances "buying in" for purpose of blocking reorganization plan as would apply to an outsider undertaking to buy into an insolvent corporation for the purpose of presenting a reorganization plan. This paper was a Carmack paper from its inception. There has never been a time since 1908 that the Carmack family did not own a substantial interest in the company. E. W. Carmack, Jr., is not an interloper nor an intermeddler. Mr. Davis is a banker and therefore is buying into this situation to make money out of it; Carmack is a successful newspaper man and bought Colonel Lea's stock in order that he might operate the paper, which he says in his petition or one of his plans for reorganization that he can operate at a profit. The exact statement in the petition is as follows:

> "Debtor has made considerable investigation of the present operating expenses of its affairs, and also of its business, and is thoroughly convinced that large savings can be had in carrying on and operating its business, and in no way affect or lower the efficiency; and that it can and will carry on its affairs and publish the papers which are now being published, at a very material reduction in cost, and in such a manner as to return good profits, and make of it a gainful and profitable business."
>
> (Rec. 96)

On the motion to dismiss, this allegation must be taken as true. It was the purpose of Mr. Carmack to save something for his widowed mother and himself out of their hold-

ings left by his father, and not to speculate upon the misfortunes of the corporation.

When the receivership bill was filed the interest on the bonds was not in default (R. 109). It is further shown that the receiver had an abundance of funds in his hands during the operation of the receivership to pay all of the accrued interest on the bonds if any was due, but that he had not used the money for that purpose, but for other purposes; that he spent $45,000.00 of the receipts of operation in extending the circulation and building up extravagant agencies, establishing motor deliveries, etc., which did not add materially to the value of debtor's properties; that the receivership had added very materially to the cost of operation of the business by unnecessarily increasing salaries alone approximately $90,000.00 a year as shown by the report of the appraiser; that the receiver had paid out of debtor's business about $60,000.00 on an unsecured claim of a creditor whose debt was in existence and due from debtor, if due at all, prior to the appointment of the receiver, and that it is believed that this money was paid out unlawfully, and was paid to certain objecting bondholders, but not on their bonds, but on this preexisting debt and upon the advice of one of the attorneys for the receiver in this case. This attorney also represents the bank and represents Mr. Davis. These charges are nowhere denied on this record.

Under this very unusual set of circumstances, and in view of the objection of M. & O. Paper Company, an unsecured creditor (R. 100) the Trial Judge said that it was hard to understand why that creditor would choose nothing rather than preferred stock and that the action of these objectors **"savors of a collusion which doesn't look good."** (R. 117)

The pleadings filed in this cause by petitioner which are taken as true on this hearing on the motion to dismiss, show that there has been great waste of the assets of the corporation and that this is a valuable property in the hands of an experienced newspaper man, and that this is a contest between the corporation owned in whole or in part for years by the Carmack family, and by certain banks or bankers who have come into this case under the circumstances above set forth.

Wherefore, petitioner most earnestly insists that as a going concern in the hands of the family that has built it and made it valuable, it is worth far more to its stockholders and cred-

itors than in the hands of speculators or banks. Therefore, we respectfully ask that this case be reversed to the end that this corporation may be saved.

Respectfully submitted,

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ROBERTS & ROBERTS,
Attorneys for Petitioner.

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In the

Supreme Court of the United States

October Term, 1935.

IN THE MATTER OF:

TENNESSEE PUBLISHING COMPANY, DEBTOR.

BRIEF OF RESPONDENTS IN OBJECTION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

May It Please the Court:

This brief in opposition to the petition for the writ of *certiorari* is filed on behalf of C. O. Carpenter, Receiver of the Holston-Union National Bank, of Knoxville, Tennessee, American National Bank, Paul M. Davis, J. C. Bradford and O. H. Ingram, of Nashville, Tennessee, R. H. M. Robinson and C. T. Jaffray, Receivers of Minnesota & Ontario Paper Company, Minneapolis, Minnesota. These respondents own and hold seventy-three per cent of the outstanding bonds issued by Tennessee Publishing Company, and likewise constitute more than fifty per cent of the unsecured creditors. All of these respondents, by proper pleadings in the District Court, appeared in response to a show cause order and moved to dismiss the Debtor's petition for reasons which appear in the opinion of the Circuit Court of Appeals for the Sixth Circuit.

It is submitted that the petition for writ of *certiorari* should be denied in this case for the reasons hereinafter set out.

REASONS RELIED UPON FOR DENIAL OF THE WRIT.

1. A review on a writ of *certiorari* is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The petition fails to set out any character of reasons generally considered by the Court in connection with petitions for *certiorari* as required by Rule 35 of this Court. Nor does the decision of the Circuit Court of Appeals for the Sixth Circuit in this case come within any of the suggested class of cases, because:

(a) The decision of the Circuit Court of Appeals for the Sixth Circuit in this cause is not in conflict with the decision of any other Circuit Court of Appeals on the same matter, and on the other hand is wholly *in accord* with all such decisions.

(b) The decision of the Circuit Court of Appeals for the Sixth Circuit in the present case is wholly tenable and is in accord with the weight of authority.

(c) The decision of the Circuit Court of Appeals for the Sixth Circuit in the present case does not involve any question of Federal law which has not been settled by this Court, nor is it in conflict with the applicable decisions of this Court. On the other hand, the decision is strictly in accord with the controlling decision of *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S., 555, 55 S. Ct., 854, 79 L. Ed., 1593, 97 A. L. R., 1106.

(d) The decision of the Circuit Court of Appeals for the Sixth Circuit in the present case is confined to its own peculiar facts, which are not likely to occur again.

(e) There is no error in law or fact in the decision of the Court of Appeals for the Sixth Circuit in the present case.

OPINION OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals for the Sixth Circuit, rendered by Circuit Judge Simons, is reported in 81 F. (2d), at page 462. The Court affirmed the action of the District Judge in dismissing the Debtor's petition for reorganization under Section 77B of the Bankruptcy Act, upon the ground that the petition was not presented in good faith as required by law, and further because the fundamental basis of the proceeding was a violation of respondent's substantive rights in the specific properties in contravention of the Fifth Amendment to the Constitution of the United States, and in violaion of the principles of law announced by this Court in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S., 555, 55 S. Ct., 854, 79 L. Ed., 1593, 97 A. L. R., 1106.

The Circuit Court of Appeals for the Sixth Circuit made a painstaking investigation into the various plans of reorganization proposed by the Debtor, and commented thereon as follows:

> "We confess our inability to understand the Debtor's proposed reorganization plan in all of its phases, even after diligent study, effort to separate argument from concrete proposals, and an earnest attempt to reconcile apparently conflicting clauses."
> (R., p. 17b.)

With respect to certain phases of the plan of reorganization, the Court said:

> "We make no effort to state them, for they are wholly incomprehensible."
> (R., p. 18b.)

The Court held in substance that the purpose of Section 77B of the Bankruptcy Act was to relieve distressed debtor corporations and to provide the mechanics for reorganization *where reasonable expectation* of continued useful existence may be fairly entertained. The Court then said:

> *"This being so, something more must be demonstrated by the debtor than mere honesty or sincerity of purpose. If not, then the way is open to the exploitation of every involved corporation by visionaries whose illusory and optimistic imaginations outrun their business judgments, and the interest of every legitimate creditor is at the mercy of debtors whose sole hope of financial salvation is an abiding faith in miracles."* (Italics ours.)
>
> (R., p. 19b.)

Upon examining the various plans of reorganization proposed by the Debtor in the light of the foregoing principles, the Court concluded from the undisputed facts that the petition must be dismissed for the following reasons:

> "It appears from the record that the total assets of the debtor upon fair appraisal are worth less than $300,000. The bonded indebtedness exceeds $900,000, and the unsecured indebtedness is more than $300,000. To this must now be added the cost and expenses of the receivership. Moreover, the receiver has been operating at a loss, and the debtor concedes that it also will for a time operate at a loss; its most optimistic undertaking being, if the property is restored to it, to reduce current losses 25 per cent. When these figures are considered together with the vagueness of detail in the proposed plan, the doubt that exists as to whether under section 77B there may now be a reopening of the adjudication of the claims against the debtor in the equity proceeding, it seems clear to us that the proposed plan *is not a workable plan, offers no reasonable prospect for successful rehabilitation of the debtor, and is in consequence not, in the sense the phrase is*

used in the section, presented in good faith." (Italics ours.)

(R., p. 19b.)

With respect to the rights of the bondholders to a judicial public sale of the properties (it being admitted that they had a specific lien against the respective properties which existed long prior to the passage of Section 77B as an amendment to the Bankruptcy Act), the Court said:

"We confine ourselves to the provisions of subsection (b) (5), which outline a method for adjustment of claims of non-assenting creditors, and inquire as to their validity in the light of the due process clause. Upon this issue we view the decision of the Supreme Court in *Louisville Joint Stock Land Bank v. Radford,* 295 U. S. 555, 55 S. Ct. 854, 79 L. Ed. 1593, 97 A. L. R. 1106, controlling. Here, under Tennessee law, as there under Kentucky law, the lien holders had the right under their contract to retain the lien until the indebtedness secured was paid, the right to realize upon the security by a judicial public sale, the right to determine when such sale should be held, subject only to the discretion of the court, the right to protect their interest in the property by bidding at such sale, the rig to have the mortgaged property devoted primarily t the satisfaction of the debt; and the right to control the property meanwhile during the period of default, subject only to the discretion of the court, and to have the rents and profits during such period applied to the satisfaction of the debt. These rights are substantive property rights, and any invasion of them under the authority of the present statute is as clearly violative of the due process clause of the Fifth Amendment as it was in the Radford Case."

(R., p. 21b.)

The petitioner's several assignments of error challenge only the validity of the foregoing conclusions of the Court,

and dispute none of the facts upon which the conclusions were reached.

GOOD FAITH

I.

It is submitted that there is no error in the decision of the Court of Appeals for the Sixth Circuit in dismissing the proceeding for lack of statutory good faith.

The record shows without dispute that this was not a bona fide petition by an embarrassed debtor corporation within the purview of the applicable statute, but on the other hand it is a speculative venture by an individual who acquired the worthless common stock of a corporation "notoriously insolvent," for an undisclosed consideration, two years after the general creditors bill had been sustained and on the day before the final step of liquidation under an equity receivership was to have been taken, to-wit, a sale of all the properties at public auction. The sole purpose of this individual speculator is financial gain, and the proceeding has no object other than this result. The Court of Appeals found as a fact:

> "A final hearing was set for June 6, 1935, and it was then the reasonable expectation of all parties in interest that a sale of assets would be ordered and the receivership terminated.
>
> "On June 5, 1935, Carmack, son of a former editor of the debtor's papers, acquired from the Leas, then its owners, all of the debtor's common stock. He immediately had himself elected president, and instituted the debtor proceedings here involved under section 77B."
>
> (R., p. 14b.)

Carmack himself filed an "Explanatory Petition," from which it appears that the whole proceeding is his personal enterprise for the purpose of having himself elected editor

of the paper and to otherwise make a personal profit out of the common stock acquired the day before the properties were to be sold. It is apparent from the explanatory petition (section 1) that after filing the petition in the name of the corporate debtor Carmack had sold and disposed of a substantial interest in the common stock contingent upon the Court's sustaining the proceeding. (R., pp. 79-83.)

The filing of the petition in the name of the corporate debtor was purely a legal fiction and the Court will not recognize the legal entity where it is used as a blind for personal purposes.

McCaskell Co. v. U. S., 216 U. S. 504, 30 S. Ct. 286, 54 L. Ed. 590.

Pierce v. *National Bank of Commerce*, 13 F. (2d) 47, 48.

Majestic Co. v. *Orpheum Circuit*, 21 F. (2d) 720.

In the recent case of *In re Cosgrave*, 10 F. Supp. 672, involving a strikingly similar situation, the District Judge stated the case as follows:

> "The question here is: Can an individual suddenly acquire an equity in property for a nominal amount, and proceed immediately under section 74 of the Bankruptcy Act?"

District Judge James answered in the negative, and dismissed the proceeding upon the following grounds:

> "The facts and circumstances connected with the acquiring of the equity as shown here, demonstrate that the sole purpose of the dealings made by the petitioner was to enable her to prosecute a proceeding under Section 74, in order that the foreclosure of the trust deed encumbrances should be prevented."
>
> *In re Cosgrave*, 10 F. Supp. at p. 673.

This principle was applied to a petition under Section 77B of the Bankruptcy Act by the District Judge in *In re*

Philadelphia Rapid Transit Co., 8 F. Supp., 51, where three creditors bought their way into court and had their petition dismissed upon the following statement by the District Judge:

> "The real purpose and motive behind the position existed before they became creditors and they became creditors solely as an aid in the accomplishment of this purpose. This was frankly admitted in the argument. They bought their way in as creditors and presumedly can sell their way out.
>
> "The petition is not in truth a real creditors' petition and in this sense is not in good faith. Approval should in consequence be denied."
>
> *In re Philadelphia Rapid Transit Co.*, 8 F. Supp., at pp. 54-55.

II.

Wholly aside from petitioner's position having been deliberately purchased for speculative purposes, it is clear that the Circuit Court of Appeals for the Sixth Circuit reached the proper conclusion in holding that the proposed plans were not workable, offered no reasonable prospect for rehabilitation of the Debtor and, therefore, the proceeding was not in good faith in the sense of the phrase as used in Section 77B of the Bankruptcy Act.

It is error to say that the District Judge approved any of the plans as feasible or workable. On this dispute it is sufficient to quote the following language of the District Judge:

> "I think the draftsman of the amended plan misconstrued the language of the Court. I admit the conclusions of the Court were poorly stated, but I do not think what was said would justify the conclusion that the plan appeared to the Court to be workable and feasible, and that, but for the constitutional question, I would approve it."
>
> (R., p. 122.)

After a full consideration of the undisputed facts, the Court of Appeals dismissed the petition because it afforded no reasonable prospect for successful rehabilitation of the Debtor. Its findings are clear and concise and its conclusions admit of no reasonable dispute. (R., p. —.) There appears to be no dispute in the decisions of any of the Federal courts as to the propriety of such action.

In re 235 West 46th Street, Inc., 74 F. (2d), 700.
In re Williamsport Wire Rope Co., 10 F., Supp., 481.
Manati Sugar Co. v. *Mock*, 75 F. (2d), 284.

The applicable rule of law is well stated in the case last above cited, in the following language:

> "To conclude that a petition is filed in good faith, there should be a showing, found within it, of a need for a reorganization. The good-faith provision of the statute is not satisfied merely by honesty and good intentions. There must be a showing that the petitioners have a basis for expecting that a reorganization can be effected. Where the object is reorganization, rather than liquidation, the petitioner should furnish some assurance, by allegations at least, that they reasonably expect a fairly general support for their proposed plan or promised plan. Otherwise there would be little to be expected in the undertaking of assuming responsibility for a reorganization.
>
> . . . . .
>
> "But it must appear that there is reasonable probability that a reorganization will be effected. In other words, the question presented is whether there may be reasonably applied to the debtor some feasible and practicable plan of reorganization. If not, there is no occasion to invoke the benefits of the act."
>
> *Manati Sugar Co.* v. *Mock*, 75 F. (2d), at p. 285.

CONSTITUTIONAL QUESTION.

The holding of the Circuit Court of Appeals for the Sixth Circuit with respect to the constitutional question involved

was merely an application of the express decision of this Court in the recent case of *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S., 555, 55 S. Ct., 854, 79 L. Ed., 1593, 97 A. L. R., 1106.

It is conceded that prior to the passage of Section 77B as an amendment to the Bankruptcy Act all of the respondent bondholders had acquired under a registered indenture, and had actually asserted in court the following substantive rights in the specific properties owned by the Debtor:

> (1) The right to retain the lien until the indebtedness thereby secured is paid.
>
> (2) The right to realize upon the security by a judicial public sale, or by sale by the Trustees, as provided in said indenture.
>
> (3) The right to determine when such sales shall be held, subject only to the discretion of the court and to the terms and conditions of said indenture.
>
> (4) The right to protect its interest in the property by bidding at such sale whenever held and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of proceeds of a fair competitive sale, or by taking the property itself.
>
> (5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.
>
> (R., p. 55.)

It is likewise admitted that all of the Debtor's plans of reorganization, propose to take these rights from the bondholders without their consent. With respect to the last plan the District Judge said:

> "It appears to me that the effect of the last plan is to disregard what has been done in the equity receivership case, and to delay a final administration of the

debtor's estate indefinitely. None of the bondholders are willing to adopt the plan; more than two-thirds of the bondholders have by pleadings, affirmatively rejected it, and more than 50 per cent of the unsecured creditors have affirmatively declined to accept the plan. If I should adopt it, or, if I should overrule the motion to dismiss the petition, it would amount to cramming down the throats of these secured creditors, a plan which they almost unanimously reject. I would be taking from them a substantive right that they have in the property, and the very best that could be said of it—the best excuse that the Court could offer—would be that it would postpone their right to a public sale of the property to such time as the Court might see fit to sell it. That is the most liberal construction in favor of the plan."

(R., pp. 122-123.)

Upon analyzing the plan of reorganization (so far as could be done), the Court of Appeals for the Sixth Circuit reached the same conclusion, and said:

"Here, under Tennessee law, as there under Kentucky law, the lien holders had the right under their contract to retain the lien until the indebtedness secured was paid, the right to realize upon the security by a judicial public sale, the right to determine when such sale should be held, subject only to the discretion of the court, the right to protect their interest in the property by bidding at such sale, the right to have the mortgaged property devoted primarily to the satisfaction of the debt; and the right to control the property meanwhile during the period of default, subject only to the discretion of the court, and to have the rents and profits during such period applied to the satisfaction of the debt. These rights are substantive property rights, and any invasion of them under the authority of the present statute is as clearly violative of the due process clause of the Fifth Amendment as it was in the Radford Case."

(R., p. 21b.)

It is to be noted that the respondent bondholders do not contend that Section 77B in all of its provisions is unconstitutional, nor do they contend that the Act is not a law upon the general subject of bankruptcy. The violation of the bondholders' constitutional rights arises out of the effort of the debtor corporation to force the bondholders to relinquish their specific rights in the substantive properties in violation of the Radford decision, without their consent and indeed without even giving them a right to vote upon the proposition. It should be borne in mind that no bondholder has consented to the plan, seventy-three per cent of the bondholders have affirmatively disapproved and rejected the plan by formal appearance in court, and more than fifty per cent of the unsecured creditors likewise formally rejected the plan.

CONCLUSION.

The assignments of error filed by petitioner do not question the finding of facts as made by the Circuit Court of Appeals for the Sixth Circuit. For that reason we have not undertaken to discuss the apparent disagreement in the petitioner's statement of facts and those contained in the opinion of the Circuit Court of Appeals, since the latter are controlling in this proceeding. It is respectfully submitted that the petition fails to present any compelling reason why this Court should review the decision of the Circuit Court of Appeals for the Sixth Circuit in the light of the standards laid down in Rule 35, subsection (5) (b), in the rules of this Court with respect to the writ of *certiorari*. There is no dispute in any of the reported cases with respect to the controlling principles of law relating to either the question of good faith or the constitutional questions involved. It is quite apparent that the petitioner disagrees with the principles announced by this Court in *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S., 555, 55 S. Ct., 854, 79 L. Ed., 1593, 97 A. L. R., 1106, but such disagreement is not a sufficient ground for a review nor

is it the duty of this Court to hear a case on *certiorari* merely to apply the well established principles of law.

We deem it proper to call the attention of the Court to the fact that in the equity proceedings referred to in the record, the District Court has ordered all of the assets of the insolvent corporation sold at public auction on June 1, 1936. The filing of the petition for *certiorari* has been delayed until only a short time intervenes before the date of sale. *It is important that the petition for certiorari be acted upon, if the business and convenience of the Court so permit, prior to June 1, 1936, the date set for the sale. These facts are called to the attention of the Court with the consent of adversary counsel.*

Respectfully submitted,

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In the

Supreme Court of the United States

No. 48.

October Term, 1936.

TENNESSEE PUBLISHING COMPANY,
PETITIONER,

vs.

AMERICAN NATIONAL BANK, C. O. CARPENTER,
RECEIVER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

REPLY BRIEF AND ARGUMENT ON BEHALF OF AMERICAN NATIONAL BANK, AND OTHER BONDHOLDERS AND CREDITORS.

May It Please the Court:

PRELIMINARY STATEMENT.

This cause involves a reorganization petition under Section 77B of the Bankruptcy Act, filed in the name of Tenness Publishing Company, a corporation, by E. W. Carmack, the owner of all of its common stock. The Tennessee Publishing Company was engaged in the publication of a morning and afternoon daily newspaper at Nashville, Ten-

nessee. Because of its insolvency its affairs had been practically fully administered in an equity proceeding in the United States District Court for the Middle District of Tennessee, under the management of a receiver appointed at the instance of bondholders and other creditors. The day before an order of sale was to be made in the orderly proceeding of the equity receivership cause, E. W. Carmack acquired all of the common stock of the debtor corporation (which was described by the District Judge as "notoriously insolvent") for an undisclosed consideration, and on the following day filed a petition for reorganization, based upon a desire to get control of the newspapers and with the hope of reaping a speculative profit, in furtherance of which the record now discloses that Carmack has disposed of a substantial portion of the common stock contingent upon his ability to have the Court approve his speculative venture. These are not mere *contention* or *conclusions*—they are admitted facts, as will be shown from the record.

The debtor's petition was filed on June 6, 1935. The cause remained before the District Judge slightly over four months, during which time Carmack, acting in the corporate debtor's name, filed a number of proposed plans for reorganization, the provisions of all of which were in such reckless disregard of the possibility of refinancing, and were so confused, involved and vague as to prompt the Circuit Court of Appeals to say:

> "We confess our inability to understand the debtor's proposed reorganization plan in all of its phases, even after diligent study, effort to separate argument from concrete proposals, and an earnest attempt to reconcile apparently conflicting clauses."
> (R., 155.)

Subsequently, in attempting to analyze certain provisions of the plan with respect to a proposed sale of bonds, the learned Circuit Court of Appeals, in its opinion, said:

> "We make no effort to state them, for they are wholly incomprehensible."
> (R., 156.)

No creditor, secured or unsecured, approved any of the plans. The entire proceedings, including all of the plans and amendments thereto, were affirmatively objected to and opposed by more than seventy-three per cent of the bondholders and more than fifty per cent of the unsecured creditors.

The debtor's proceeding was dismissed by the District Judge and the properties were ordered sold in the equity receivership. (R., 123.) His action was affirmed by the Circuit Court of Appeals for the Sixth Circuit (*In re Tennessee Publishing Company*, 81 F. (2d), 463). In the course of its opinion, in answer to the argument that the debtor was "sincere" in its efforts and therefore acting in "good faith," the Circuit Court of Appeals said:

> "It appears from the record that the total assets of the debtor upon fair appraisal are worth less than $300,000. The bonded indebtedness exceeds $900,000, and the unsecured indebtedness is more than $300,000. To this must now be added the cost and expenses of the receivership. Moreover, the receiver has been operating at a loss, and the debtor concedes that it also will for a time operate at a loss, its most optimistic undertaking being, if the property is restored to it, to reduce current losses 25%. When these figures are considered together with the vagueness of detail in the proposed plan, the doubt that exists as to whether under Section 77B there may now be a reopening of the adjudication of the claims against the debtor in the equity proceeding, it seems clear to us that the proposed plan is not a workable plan, offers no reasonable prospect for successful rehabilitation of the debtor, and is in consequence not, in the sense the phrase is used in the section, presented in good faith."
>
> (R., 157.)

The case now comes before this Court on a petition for *certiorari* filed May 4, 1936, and granted May 18, 1936.

STATEMENT OF THE CASE.

The General Creditors Suit.

The Tennessee Publishing Company is a corporation engaged in publishing two daily newspapers at Nashville, Tennessee, both being known as the *Tennessean*, one being published in the morning and the other in the afternoon. The essential facts with reference to the general creditors insolvency proceedings relating to this corporation prior to the filing of the debtor's petition in bankruptcy appear first in the answer and motion to dismiss filed by American National Bank, a creditor, on July 12, 1935. (R., 18-27.) In these proceedings the Tennessee Publishing Company will usually be referred to as debtor. The debtor issued its first mortgage bonds in the principal sum of $750,000.00 on November 1, 1928, secured by a deed of trust, duly registered, covering all of the properties of the debtor of every kind whatsoever excepting only certain fluctuating assets such as materials consumable in use, printing ink and newsprint paper, cash on hand and accounts receivable. The amount of principal and interest due and unpaid on these bonds as of July 1, 1935, was $879,375.00.
(R., 19.)

The various defaults averred in the general creditors bill existing at the time it was filed are not denied by the petitioners but are admitted. We quote from the petitioner's "Statement of the Case," as follows:

> "At the time of the filing of said bill in March, 1933, for the appointment of a receiver to conserve the assets of said corporation, its business was being neglected and its assets were being dissipated, under circumstances set out in said equity proceedings."
> Petition for *Certiorari*, p. 25(b).

The general creditors bill in equity was filed on March 3, 1933, and the "circumstances set out in said equity proceedings" referred to in the above quoted statement from the petition for *certiorari* were as follows:

(a) That debtor owed plaintiff approximately $100,000.-00, to secure which plaintiff held $28,000.00 of the aforementioned bonds along with certain other collateral, and said indebtedness was past due and unpaid.

(b) That the total liabilities of the debtor, including claims of all classes, were approximately $1,500,000.00 and the fair value of the debtor's physical assets was approximately $337,000.00, and that the debtor was hopelessly insolvent.

(c) That the debtor had operated continuously from the year 1929 to the filing of the bill at a tremendous loss, as follows:

1929 net operating loss	$ 18,779.79
1930 net operating loss	125,977.00
1931 net operating loss	133,900.34
1932 net operating loss	83,750.82

(d) That the affairs of the debtor had reached such a critical state that the total gross income from all sources was less than the operating expenses. The debtor was faced with additional monthly deficits and that it was unable to pay the salaries and wages due its employes, and had issued checks to its employes for salaries and wages which the bank had declined to pay because of insufficient funds.

(e) The debtor had no supply of newsprint paper other than that which it purchased daily from a local warehouse, and that the situation was so acute that the debtor would very shortly be unable to purchase the necessary newsprint paper in order to publish its daily morning and afternoon editions; that the debtor was delinquent in the payment of various taxes, and distress warrants had been issued and were in the hands of officers to be levied upon the debtor's assets; that the debtor had permitted its president, vice-president and general manager to withdraw large sums of money from its assets, and that the individals occupying these positions had recently been tried and convicted, and were then sentenced to serve a term in the penitentiary in the State of North Carolina; and that said individuals, who were the controlling spirits and owners of

the common stock of the debtor, had departed from their usual place of residence in Nashville, Davidson County, Tennessee, and had taken up residence in Montgomery County, Tennessee, and had to all practical purposes abandoned the affairs of the debtor corporation, which in the meantime had drifted into a hopeless financial condition with no hope of any financial rehabilitation from any source whatsoever, and its demise was only a matter of a few days.

(f) That the debtor during this period had permitted its machinery, equipment and presses to become in a bad state of repair, had failed to make the usual replacements required by the normal operations of the business, and was able to print its daily editions only with the greatest difficulties.

(g) That as a result of the foregoing situation and the neglect by the debtor of its corporate affairs, the circulation of the newspapers had dropped from 96,221 to 80,256, or a net loss in circulation over a two-year period of approximately 16,000.

(R., 20-21.)

Upon the filing of the bill the Honorable Lit J. Pardue was appointed as Receiver and took possession of debtor's properties on March 3, 1933, from and after which date he has had complete control of the operations and affairs of debtor, acting under the guidance and instruction of the court. On June 3, 1933, after notice and hearing and without any objection or protest on the part of the debtor, the court sustained the bill as a general creditors bill, and judicially declared the debtor to be insolvent and ordered a reference to the Standing Master to take proof and report upon the claims and priorities of all creditors, whose claims were required by notice and publication to be filed by December 15, 1933. Pursuant to this order claims aggregating approximately $1,500,000.00 were filed, including the claims of bondholders and various alleged unsecured creditors. (R., 21, 22.) Many of the claims were contested and hearings were had before the Standing Master over a period of several months, the testimony taken, excluding exhibits, comprising several hundred pages. Oral arguments were

had, brief's were filed, and on March 20, 1935, the Standing Master filed his report based upon all of the claims filed against the debtor. All of the bondholders appeared and proved their claims before the Standing Master, and no exception was filed to his report insofar as it related to the ownership and amount due on said bonds and the report of the Master became final as to these matters. (R., 22.) The owners and holders of the bonds were found and judicially determined, as follows:

Name	*Principal*
American National Bank, Nashville, Tenn.	$210,000.00
W. G. Bush & Company, Nashville, Tenn.	115,000.00
Canal Bank & Trust Company, New Orleans, La.	250,000.00
O. H. Ingram, Nashville, Tennessee	60,000.00
C. O. Carpenter, Receiver, Holston-Union National Bank, Knoxville, Tennessee	28,000.00
Broadway Discount Corporation, Nashville, Tennessee	23,000.00
Commerce-Union Bank, Nashville, Tenn	64,000.00

The District Judge, in dismissing the debtor's petition, referred to the foregoing facts in the following language:

> "In that case the validity and amount of the bonds outstanding was established. The debtor was a party to that suit; the question was submitted to the Standing Master; and he made his report covering that question. The report, I am informed, is unexcepted to."
> (R., 122.)

Certain exceptions were filed with respect to some of the unsecured claims and these exceptions were argued before the court and taken under consideration. Thereafter, by proper proceedings and on motion of the plaintiff in the equity receivership cause, a final hearing was ordered to be held on June 6, 1935, for the purpose of acting on the exceptions to the Master's report and to order a sale of the properties so as to terminate the receivership.
(R., 22, 23.)

The debtor corporation was a party to all of these proceedings and had notice of each step taken, and the debtor corporation stood by for an entire year and permitted the equity proceedings to be carried to the point of practically a complete liquidation without filing any proceedings for reorganization. It further appeared that the receivership during the calendar year 1933, notwithstanding the arduous attention and careful handling by the receiver, operated at a loss of approximately $10,000.00, not including interest on the bonds, and also that it operated at a loss for the year 1934 in approximately the same amount. The receiver owed for borrowed money $28,328.62, and had on deposit less than $1,000.00, the corporation having no working capital in the business.

(R., 24.)

The debtor's situation was described by the District Judge as follows:

> "It is admitted, and in fact, is abundantly shown by the report of the Standing Master in the equity cause, that the debtor is *notoriously insolvent.*"
>
> (R., 122.)

The facts leading up to the filing of the debtor's petition for reorganization, in the most favorable aspect to the petitioner, may be obtained from the original petition filed June 6, 1935, (R., 2-7), and the pleading entitled "Explanatory Petition of Debtor" filed October 14, 1935.

(R., 79.)

The original petition avers that the debtor has made default in the payment of its bonds aggregating $750,000.00, and the interest thereon, and that the corporation owes unsecured debts in an additional sum of $750,000.00, has $300,000.00 in preferred stocks outstanding, and that the court was about to order a sale of the properties in the equity proceeding. It further avers:

> "The debtor would show that of the total amount of the common capital stock outstanding 2995 shares belong to the president of the corporation, Edward W.

Carmack, the same being all of the common capital stock of the corporation except 5 shares."
(R., 4.)

The Circuit Court of Appeals found as a fact:

"On June 5, 1935, Carmack, son of a former editor of the debtor's papers, acquired from the Leas, then its owners, all of the debtor's common stock. He immediately had himself elected president, and instituted the debtor proceedings here involved under Section 77B."
(R., 152-153.)

The facts appearing from the "Explanatory Petition" of debtor are illuminating. E. W. Carmack's father, prior to his death 27 years before this proceeding was filed, had at one time been editor of the *Tennessean*. At the time of his death he owned 5% of the preferred stock, which was in the name of one Lander as trustee, and presumably since his death Edward W. Carmack, Jr.'s mother owned one-half and evidently Carmack, Jr., owned one-half of this stock, each having 2½% of the preferred stock.

Carmack states that about a year before the filing of the receivership bill he "began to devise plans to acquire a further interest in the properties of debtor corporation to the end that he might become editor-in-chief of the papers published by the debtor. . . ." (R., 80.) He states that he had "good reasons to believe that said papers could be made a *paying proposition* by proper and economical management." (R., 81.) His "fixed purpose was to become editor of the paper and establish it as a profitable business enterprise. . . ." (R., 81.) Luke Lea owned all of the common stock which controlled the newspaper. Carmack admits that he made no effort to purchase this common stock from Lea until the "spring of 1935"—only a month or so prior to the filing of the debtor's petition, more than two years after the receivership. He acquired this common stock from Luke Lea "immediately prior to the filing of the petition of June 6, 1935." (R., 81.) We quote from Carmack's own "Explanatory Petition:"

"On June 5, 1935, a meeting of the stockholders of debtor corporation was held, when Luke Lee, Jr., then the holder of the common stock of his father, Colonel Lea, in furtherance of the trade which had been made by said Carmack, voted his father's stock under a power of attorney authorizing him so to do, at which meeting E. W. Carmack, Jr., was elected President of debtor corporation. . . . (R., 81-82.)

"At the meeting of June 5, 1935, a Board of Directors was first elected by the stockholders present and this Board of Directors formally elected the officers of the corporation, including E. W. Carmack, Jr., President, and both in the meeting of the stockholders and in the meeting of the Directors, action was taken authorizing and directing the filing of the petition for the reorganization of debtor corporation which was sought by the petition filed on June 6, 1935." (R., 82.)

In answer to the bondholders' averment that Carmack had acquired this common stock knowing that it was worthless, as the corporation was hopelessly insolvent, and for purely speculative purposes and without consideration, the "Explanatory Petition" averred "debtor further states that E. W. Carmack, Jr., acquired the common stock of debtor corporation from Colonel Luke Lea for a valuable consideration *agreed upon* between E. W. Carmack and representatives of Colonel Luke Lea." (R., 82.) It was not claimed that any consideration had been *paid* but only that it had been agreed upon, and although Carmack felt called upon to file an explanatory petition he did not undertake to disclose what consideration, if any, was paid for this worthless stock.

This "explanatory petition" further discloses that since the filing of the original petition Carmack had sold and disposed of a substantial portion of the common stock. This sale was to parties having no previous connection with the Debtor corporation. We quote from the petition:

"That is to say, that by the arrangement above mentioned under which other persons now have a valid and subsisting interest in said common stock standing in the name of E. W. Carmack, Jr., under which arrange-

ment experienced and capable business men are to become actively connected with the operation of debtor corporation, as soon as the reorganization plan is approved by the Court, and are to furnish funds both for the purpose of complying with the orders of the Court in connection with the reorganization plan, and also funds sufficient adequately and properly to carry on the business of debtor corporation by the publication of a daily newspaper or newspaper in Nashville."
(R., 79-80.)

It appears therefore that this proceeding was not instituted by a corporation in the ordinary course of its affairs but that on the day before the final liquidation of a hopelessly insolvent corporation under a general equity proceeding, an individual for speculative purposes and in the sole hope of financial reward purchased and acquired the entire outstanding worthless common stock for an undisclosed and unpaid consideration, and resold a substantial portion to certain "financial interests" contingent upon this stockholder's ability to successfully defeat the orderly liquidation in the general equity receivership cause by the filing of this petition and acquiring the assets at an appraisal, notwithstanding the existence of a starting cash bid in the equity proceeding greatly exceeding the appraised value of the property. Apparently, this individual was to be rewarded with the editorship of the papers, carrying certain financial perquisites, and outside speculators and strangers to the debtor corporation were to own substantially all of the stock.

Proceedings Dismissed by District Judge on Original Show Cause Order.

The life of this proceeding began with the filing of the original petition for reorganization on June 6, 1935, and ended with the dismissal of the petition on October 25, 1935. At the time the original petition was filed the District Judge entered a decree permitting the petition to be filed upon the ground that its allegations complied with the requirements of the law, and adjudged *pro forma* that the petition was filed in good faith but issued an order for

creditors and other parties to appear on July 6, 1935, for the purpose of showing cause, if any, as to whether or not the petition should be dismissed. This order read:

> "It is further ordered, adjudged and decreed that a rule forthwith issue against all parties to the aforesaid Receivership case, and to all creditors and stockholders in the Tennessean Publishing Company to appear and show cause, if any, as to whether or not the aforesaid petition of the Tennessee Publishing Company should be dismissed at a hearing before the Judge of this court at the Federal Court Room, in Nashville, at 9:00 a.m. on July 6, 1935, and L. J. Pardue, Esq., in the aforesaid Receivership case as the party in possession of the business, property and effects of the alleged debtor is ordered to notify all the said parties, creditors, stockholders of the issuance of said rule and said hearing in the manner and form of a published notice thereof in the morning *Nashville Tennessean,* said insertion of published notice to appear at a time not less than two weeks prior to July 6, 1935, and to be generally addressed to such parties, creditors and stockholders as aforesaid."
>
> (R., 1-2.)

Various bondholders and creditors did appear and showed cause, and after continuing the hearing over a period of months, the District Judge, in response to the original order permitting the petition to be filed, which was conditioned upon the creditors being permitted to show cause, dismissed the petition for the reasons appearing in the oral opinion delivered on October 23, 1935, the court being of the opinion that while the *motive or intent* of Carmack was proper, the entire proceeding was impractical, and futile, and involved a procedure wholly in violation of the constitutional rights of the bondholders. The District Judge, in so doing, said:

> "It appears to me that the effect of the last plan is to disregard what has been done in the equity receivership case, and to delay a final administration of the debtor's estate indefinitely."
>
> (R., 122.)

He therefore dismissed the petition and ordered the property sold in the equity case.
(R., 123.)

Plans of Reorganization.

In the course of the proceedings held before the District Judge pursuant to the original show cause order upon which the filing of the debtor's petition was conditioned, the debtor filed three different plans of reorganization, with various amendments thereto. These plans and the dates of filing appear in the record, as follows:

July 13, 1935—First Plan of Reorganization.
(R., 34.)

August 31, 1935—Second Plan of Reorganization.
(R., 40.)

October 15, 1935—Amended Plan of Reorganization.
(R., 86.)

October 23, 1935—Third Plan of Reorganization.
(R., 93.)

October 25, 1935—Amendment to Third Plan of Reorganization.
(R., 109.)

Offer of Paul M. Davis.

In the meantime Paul M. Davis, of Nashville, Tennessee, intervened in the cause and offered to purchase the properties covered by the bond mortgage, and to pay the sum of $400,000.00 therefor and to pay an additional sum of $40,000.00 for the assets not covered by the bond mortgage, and further agreed that said offer might be deemed and treated as an upset price if the court ordered the property sold at public auction in the equity receivership cause, the said Davis agreeing to furnish proper guaranties binding himself to appear at such sale and bid the amounts above set out for the properties.
(R., 100A-100B.)

In the course of the proceedings the properties covered by the bond mortgage had been appraised by American Appraisal Company at the sum of $295,585.18.
(R., 66.)

The largest amount offered bondholders in any of the various proposed plans of reorganization was this appraised value. The offer of Paul M. Davis exceeded this appraised value by $100,000.00 and in addition was offered as a minimum bid in event of a judicial public sale.

No creditor of any class, bondholder or unsecured creditor, accepted any of the plans of reorganization. The holders of more than seventy-three per cent of the outstanding bonds intervened in the cause and by proper pleadings disapproved the plans as being impractical, futile, violative of their constitutional rights, not filed in good faith, and demanded that the properties be sold at judicial public sale in the equity proceedings. These pleadings appear in the record, as follows:

C. O. Carpenter, Receiver of Holston-Union National Bank, R., 15, 85, 101.
American National Bank, R., 19, 51, 106.
O. H. Ingram and J. C. Bradford, R., 27, 98.
Paul M. Davis, R., 101.

The objections filed by C. O. Carpenter, Receiver, were both in his capacity as the holder of bonds in the principal sum of $28,000.00 and of an unsecured indebtedness in the sum of approximately $105,000.00 (less any sum received on the bonds which were held as collateral).
(R., 15.)

The Receivers of the Minnesota & Ontario Paper Company, an unsecured creditor to the extent of $121,494.00, filed an answer setting out its unwillingness to consent to or participate in the plan of reorganization filed by Carmack in the corporate debtor's name.
(R., 78, 100.)

With respect to creditors the District Judge found as a fact:

"None of the bondholders are willing to adopt the plan; more than two-thirds of the bondholders have

by pleadings, affirmatively rejected it, and more than 50 per cent of the unsecured creditors have affirmatively declined to accept the plan. If I should adopt it, or, if I should overrule the motion to dismiss the petition, it would amount to cramming down the throats of these secured creditors, a plan which they almost unanimously reject."

(R., 122-123.)

This finding was affirmed by the Circuit Court of Appeals.

(R., 153.)

Although apparently all of the various plans were finally abandoned by the debtor except the one designated Third Plan of Reorganization, they are so interrelated that it is deemed proper, for the convenience of the court, to briefly summarize each of the plans.

First Plan of Reorganization.

This plan was filed July 13, 1935. (R., 34.) It proposed that the value of the bonds and the value of the assets be ascertained by appraisal or by reference, and that this be judicially determined and fixed by the court. The debtor corporation would thereupon issue first mortgage bonds in an amount equal to 100 per cent of the appraised value of its assets, with interest at 5 per cent, and the debtor corporation would offer these bonds for sale and they were to be sold some time within the next seven months at not less than 97 cents on the dollar. If the bonds were thus sold, Carmack, as the holder of the common stock, would make a cash donation equal to any deficiency between the par value of the bonds and the price realized.

This donation and the proceeds from the sale of the bonds (supposedly equaling the appraised value of all of the assets) were to be paid into the court and used to first pay the costs and expense of the bankruptcy proceedings, then the costs of the receivership cause, and then any preferred claims allowed in the receivership cause, and the balance,

if any, was to be distributed between the secured and unsecured creditors and the stockholders of the debtor corporation.

Carmack also proposed to have the insolvent debtor corporation issue preferred stock in the total amount of $100,000.00 to be distributed to unsecured creditors proportionately to make up the difference between the amount received and the amount of such debts. The dividend on this preferred stock was to be 6 per cent non-cumulative, and the stock was non-voting. Class B preferred stock aggregating $25,000.00 was to be divided ratably among the preferred stockholders. $50,000.00 was to be donated to the debtor corporation, which was to be used to take care of the deficiency between the sale price of the bonds and par, if any, and the balance would be used as working capital.

All of this was contingent and conditional upon the court discharging the receivership and immediately turning all of the assets over to Carmack, after which he was to have approximately seven months to sell and dispose of the bonds. The plan also contained certain representations to the effect that Carmack could cut down the operating loss of the newspapers 10 per cent, that is, that his operating loss would be only about 90 per cent of that sustained by the Receiver.

There were certain other immaterial provisions in the plan.

Second Plan of Reorganization.

The debtor apparently perceiving the utter futility and impracticability of the first plan (for example, the sale of bonds at 97 secured only by personal property in an amount equal to 100 per cent of the appraised value of such property), on August 31, 1935, filed what is designated in the record as the "Second Plan of Reorganization," which is said to be a supplement to or an alternative of its previous plan. (R., 40.)

This plan apparently differed from the first plan only in the following particulars: It provided specifically that all the hearings and reports of the Standing Master in the equity receivership cause should be set aside, and that all creditors should be required to again prove their claims in the bankruptcy cause, and that the debtor should not be bound by the previous final determination of the bondholders' rights. The debtor further offered to submit a guaranty or underwriting of the sale of its bonds to the extent of $300,000.00 if the court would approve the alternative plan of reorganization, said guaranty to be furnished within five days after the prior approval of the plan by the court. This was to be the maximum purchase price to be paid by the debtor for all of its assets. (R., 42, 43.)

This plan was subsequently amended so as to provide that the debtor would pay into court the appraised actual cash value of the valid interest, claims or liens on the debtor's property when judicially determined, or take the property covered by the mortgage or deed of trust to secure the bonds at the value shown in the appraisal of the American Appraisal Company (approximately $300,000.00.) (R., 86.)

On October 15, 1935, the District Judge rendered an oral opinion holding that all of the plans previously filed were futile and were violative of the constitutional rights of the bondholders and ordered the petition dismissed. (R., 111.)

Thereupon the debtor filed a third plan of reorganization on October 23, 1935, expressly stating that it was not waiving, abandoning, or in any way reflecting upon its previous plans of reorganization but on the contrary preserving all of its rights with reference thereto.
(R., 93.)

Third Plan of Reorganization.

The third plan of reorganization is difficult to analyze because of its many confusing and inconsistent provisions. The first portion of the plan provided generally for scaling down the indebtedness of the bondholders to 80 per cent of the principal amount, provided the bondholders consented

thereto, a redelivery of the properties to the debtor or some other corporation subject to the reduced bonded indebtedness, and a waiver by the bondholders of all accrued interest, amounting to approximately $146,150.00. (R., 107.) As to non-consenting bondholders, the plan in its first part proposed that the amount due them be "judicially determined." Section VI (R., 97) of this plan would appear to indicate that the plan was conditioned upon non-consenting bondholders' claims being reduced to the actual consideration paid by the various bondholders at the time the bonds were acquired, which were alleged to be less than 80 cents on the dollar. The plan further provided for the payment of $40,000.00 for the assets not covered by the bond mortgage. There was further to be an involuntary extension of the maturity of the bond indebtedness, without the consent of any of the bondholders, for an indefinite time to be determined by the court, at such rate of interest as the court might deem reasonable. The past due sinking fund deposit of $100,000.00 due February 28, 1934, (R., 19), was to be waived and, apparently so were all other future sinking fund requirements.

The first portion of this plan (Sections I to III inclusive) apparently contemplate a redelivery of the property to the insolvent corporation upon its assumption of the bonds at 80 per cent of the principal indebtedness.

Sections IV and V, however, are wholly *antagonistic* to the foregoing provisions and appear to contemplate a sale or a new bond issue and distribution of the proceeds to creditors in some manner. We quote from Section IV:

> "As soon as it is definitely determined how much will be paid the unsecured creditors *from the proceeds of the sale of the proposed bond issue, as above set out*, debtor will issue class 'A' preferred stock. . . ." (Italics ours.)
> (R., 96.)

In Section V it is stated:

> "As soon as it is definitely determined how much will be paid the preferred stockholders *from the pro-*

ceeds of the sale of the proposed bond issue, as above set out, debtor will issue class 'B' preferred stock. . . ." (Italics ours.)
(R., 96.)

This third plan of reorganization was filed after the District Judge had rendered an oral opinion dismissing the proceedings. It is so inconsistent in its provisions that one can not determine whether it involved an assumption of liability in a reduced amount or the execution and sale of new bonds and a distribution of the proceeds in some manner. Two days after the District Judge for the second time had dismissed the proceedings, and on the same day that the final order and decree so dismissing the proceedings were entered (R., 124), a document was filed in the cause entitled "Amendment to Plan of Reorganization Filed October 23, 1935." (R., 109.) This document, instead of being an amendment to the plan of reorganization, in fact appears to be merely a criticism of Mr. L. J. Pardue, the Receiver in the equity suit of *C. O. Carpenter, Receiver,* v. *Tennessee Publishing Company,* and, of course, has no place in the record since it related to an entirely different proceeding.

Motions to Dismiss and Action of the District Judge Thereon.

The District Judge on two separate occasions, after many hearings, sustained the motions of various bondholders to dismiss the entire proceeding, said motions having been made pursuant to the original order to show cause which was a condition precedent to the first decree permitting the debtor's petition to be filed and which was entered on June 6, 1935.

The District Judge found as a fact that the petition was filed in good faith. In so doing it is quite clear from the opinion itself that the court did not have in mind the *legal definition* of good faith but was speaking solely of *intent* and *purpose,* as distinguished from *reasonable possibility of successful reorganization.*

The finding of good faith by the District Judge was predicated apparently upon the following reason:

> "As stated, I can readily see from sentimental as well as from financial reasons that Mr. Carmack would like to become connected with the paper."
> (R., 115.)

The District Judge's finding of good faith based upon motive and intent was reversed by the Circuit Court of Appeals, in the following language:

> "It is clear from the court's memoranda that in deciding the issue of good faith it was guided mainly by a consideration of the honesty of purpose on the part of the debtor in submitting its plan. Section 77(b) does not undertake to define good faith. We think it clear, however, in agreement with the Second Circuit, that something more than sincerity of intention was intended. The purpose of the statute is to relieve distressed debtor corporations, and to provide the mechanics for reorganization where reasonable expectation of continued useful existence may be fairly entertained. This being so, something more must be demonstrated by the debtor than mere honesty or sincerity of purpose. If not, then the way is open to the exploitation of every involved corporation by visionaries whose illusory and optimistic imaginations outrun their business judgments, and the interest of every legitimate creditor is at the mercy of debtors whose sole hope of financial salvation is an abiding faith in miracles. If we are right in this, there was erroneous application of the law in the finding of good faith, and the decree dismissing the petition should upon familiar principles governing appeals in equity be affirmed if right, however erroneous may be any given conclusion of law."
> (R., 156-157.)

Summary of Reasons for Dismissal by District Judge.

The District Judge delivered an oral opinion on October 15, 1935, discussing in detail the plans of reorganization then before him, which provided in substance that the

bondholders would be required against their consent to accept the appraised value of the properties covered by their deed of trust and cancel their obligations, permitting the properties to be returned to the debtor. The District Judge held that any plan containing such provisions violated the Fifth Amendment to the Federal Constitution and he sustained the motion to dismiss upon that ground upon the theory that it would be useless and expensive to go further with the proceedings.

(R., 120.)

After the District Judge had ordered the entire proceedings dismissed, but before a decree was entered, the debtor filed its third plan of reorganization on October 23, 1935, at the same time relying upon and not waiving its previous plans, the new plan (in Section VI) providing, with respect to non-consenting bondholders, for a compulsory scalding down of their obligations in some vague manner apparently either to the appraised value or to what the more recent purchasers had paid for the bonds. (R., 97-98.) Other provisions of this plan have heretofore been set out.

The Court will observe that the beginning paragraph of this third plan of reorganization undertook to recite that its previous plans had been approved by the District Judge as feasible and workable. The District Judge, taking note of these statements, in the *final* opinion again dismissing the debtor's proceeding, commented as follows:

> "Before disposition of the case, I desire to refer briefly to some matters contained in the amended plan which I think should be corrected.
>
> "I do not think the conclusions reached by the draftsman of the amended plan, filed October 23, 1935, are in all respects supported by the oral opinion delivered from the bench on October 15th. In the preliminary statement to the present amended plan, it is stated that the Court held that the plans that had, at that time been filed, appealed to the Court as feasible and workable, and that he would have been pleased to approve the plan, except, that same was not ap-

proved by two-thirds of the bondholders, and therefore, was violative of the Fifth Amendment to the Constitution of the United States; and that the Court stated that if the plan provided for the retention by the debtor of its property, subject to the claims and interest of the secured creditors, in the Court's opinion, would have been constitutional, and violate no rights of the secured creditors.

"What the Court said upon that question was, that the plan was proposed in good faith, and as an evidence of good faith, it contained certain provisions relative to unsecured creditors, stockholders, etc., which appealed to him, *but I did not say that the plan was feasible and workable, and that, but for the lack of approval by two-thirds of the bondholders, I would be glad to approve it.* On the contrary, it was stated, 'I do not intend now to say, or to intimate, that in the event I should overrule the motion to dismiss the petition, that the plan proposed will be approved by the Court.' It was further stated, in reference to the proponents' ability to carry out the provisions of the plan, that the Court 'had no reason to doubt that they can do just what they say they can do' in this regard.

"I think the draftsman of the amended plan misconstrued the language of the Court. I admit the conclusions of the Court were poorly stated, *but I do not think what was said would justify the conclusion that the plan appeared to the Court to be workable and feasible, and that, but for the Constitutional questions, I would approve it.* I could not properly have said that because at that time, the case was not in such condition as to justify an expression of opinion as to whether the plan would be approved or not." (Italics ours.)

(R., 121, 122.)

The District Judge thereupon proceeded to consider the debtor's latest plan, and his conclusions with respect thereto may be summarized as follows:

(1) That the validity and amount due the bondholders had been finally determined in the equity proceedings in the case of *Carpenter, Receiver,* v. *Tennessee Publishing*

Company, and that the debtor was a party to that suit and had made no objections to the report of the Standing Master, and that it would work an injustice to reconsider the matter and undertake to undo what had already been finally determined in the equity proceedings. (R., 122.)

(2) That the debtor admitted, and the fact was abundantly shown by the report of the Standing Master in the equity case, that Tennessee Publishing Company was *notoriously insolvent*. (R., 122.)

(3) That in view of the notorious insolvency of the debtor the *effect* of this proceeding would be to disregard what had been done in the equity receivership case and to delay the final administration of the debtor's estate indefinitely. (R., 122.)

(4) That none of the bondholders were willing to adopt the plan; more than two-thirds of the bondholders had by pleadings affirmatively rejected it, and more than 50% of the unsecured creditors had affirmatively declined to accept the plan. Under these circumstances for the court to approve the plan "would amount to cramming down the throats of these secured creditors a plan which they almost unanimously rejected," and would take from them the substantive rights which they had in the property and, under the most liberal construction of the plan, would violate the Fifth Amendment to the Federal Constitution. (R., 123.)

(5) That in view of the financial condition of the debtor a sale of its property was *inevitable* and that the bondholders (whose property rights were acquired in 1928 prior to the enactment of Section 77B) were entitled to a judicial sale of the property under the opinion of the Supreme Court of the United States in the case of *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S., 555. (R., 123.)

(6) That the petition should therefore be dismissed and the property sold in the equity case. (R., 123.)

The learned Circuit Court of Appeals concurred in all of the above findings of fact and affirmed the action of the District Judge in dismissing the proceedings.

(R., 151-160.)

It is submitted that there was no error in the action of the District Judge or the Circuit Court of Appeals and that the writ of *certiorari* granted in this case should be dismissed as inadvertently issued, for the reasons now to be set forth.

PROPOSITIONS OF LAW.

I

Speculators in equities were not within the contemplation of Congress in the passage of Section 77B as an amendment to the Bankruptcy Act. An individual who acquires control of a notoriously insolvent corporation in order to attempt a reorganization for a speculative profit is not acting in good faith.

Fletcher's Cyc. Corps., Vol. I, § 41, p. 134.
Pierce v. *National Bank of Commerce,* 13 F. (2d), 40.
Majestic Co. v. *Orpheum Circuit,* 21 F. (2d), 721.
In re Cosgrove, 10 F. Supp., 672.
In re Philadelphia Rapid Transit Co., 8 F. Supp., 55, (affirmed without opinion, 73 F. (2d), 1022).
In re North Kenmore Bldg. Corp., 81 F. (2d), 656.
In re Francfair, Inc., 13 F. Supp., 513.
Shapiro v. *Wilgus,* 287 U. S., 348, 77 L. Ed., 355.

II

"Good faith," as used in Section 77B of the Bankruptcy Act, requires more than mere honesty of purpose or sincerity of intent. Where it is apparent that because of the notorious insolvency of the debtor there is no reasonable expectation of a successful reorganization, the proceeding must be dismissed as not filed in good faith.

In re 235 West 46th Street Co., 74 F. (2d), 701.
In re Williamsport Wire Rope Co., 10 F. Supp., 481, (approved and appeal dismissed, 78 F. (2d), 1023).
Manati Sugar Co. v. *Mock, et al.,* 75 F. (2d), 285.
In re Philadelphia Rapid Transit Co., 8 F. Supp., 55, (affirmed without opinion, 73 F. (2d), 1022).
In re Sterba, 74 F. (2d), 413.
In re Electric Public Service Co., 9 F. Supp., 128.

III

The District Judge and the Circuit Court of Appeals concurred in the finding that the plans proposed by the debtor

were not feasible and that it would be unfair to the bondholders to further delay a sale of the properties because of the notorious insolvency of the debtor and the increasing losses in operations under the receivership. These findings are conclusive in this Court unless clearly erroneous.

Continental Illinois Nat'l. Bank & Trust Co. v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S., 648, 79 L. Ed., 1110.
In re Murel Holding Corp., 75 F. (2d), 941.
Preble Corp. v. *Wentworth, et al.*, 84 F. (2d), 73.
Francisco Bldg. Corp., Ltd. v. *Battson*, 83 F. (2d), 93.

IV

Bondholders whose substantive rights in specific properties arose and existed prior to the passage of Section 77B as an amendment to the Bankruptcy Act can not be deprived of such substantive rights without their consent, and to do so would violate the Fifth Amendment to the Constitution of the United States.

Louisville Joint Stock Land Bank v. *Radford*, 295 U. S., 555, 79 L. Ed., 1593.
In re Lowmon, 79 F. (2d), 887.
In re Young, 12 F. Supp., 30.
In re Sherman, 12 F. Supp., 297.
In re Tschoepe, 13 F. Supp., 371.
In re Schoenleber, 13 F. Supp., 375.
In re Davis, 13 F. Supp., 221.
In re Diller, 13 F. Supp., 249.
Robert Page Wright v. *Vinton Branch, etc. Bank*, and five other cases. (Decided October 6, 1936, by Circuit Court of Appeals for Fourth Circuit, not yet reported.)

ARGUMENT.

I.

Proceeding Purely Speculative.

As has been previously pointed out and concurrently found by the District Court and the Circuit Court of Appeals, this proceeding originated out of the purchase of the entire common stock of Tennessee Publishing Company by E. W. Carmack, Jr., on June 5, 1935, just one day before the petition was filed. Carmack and his mother, prior to that time, owned a beneficial interest in only 5% of the preferred stock of the corporation. He had not in any way been associated with the newspapers published by the debtor and his ownership of the preferred stock came from his father, who died 27 years prior to the filing of this petition. Carmack frankly states that he devised the plan of acquiring the common stock of the debtor for the sole purpose of having himself elected editor-in-chief of the newspapers and because he felt that he could profit financially from the venture.

At the time this purchase was made the debtor's affairs were being administered by a receiver, under a general creditors' bill filed and sustained more than two years prior to the purchase. The insolvency of the debtor was described by the District Judge as "notorious." Its secured obligations, including interest, amounted to approximately $900,000.00, its unsecured obligations exceeded $300,000.00, and it had outstanding $300,000.00 in preferred stock—which meant that the debtor would be required to have assets equal to $1,500,000.00 before the common stock would have any asset value. The appraised value of the assets, and indeed the maximum amount offered by the debtor for the purchase of all of the assets, is a little over $300,000.00. Upon such a valuation the bondholders and unsecured creditors would receive only a fractional amount upon their claims, the preferred stock would be worthless, and the common stock was of no value. Under these circumstances Carmack negotiated for and acquired the common stock, had a new

board of directors elected, which in turn elected Carmack president, and simultaneously authorized him to file these proceedings—and Carmack admits in his "explanatory petition" that this was "in furtherance of the trade which had been made by said Carmack." (R., 81.) After filing the petition in the name of the corporate debtor, Carmack then proceeded to sell and dispose of a substantial interest in the common stock, which sale was contingent upon the court's sustaining this proceeding and approving the plan of reorganization. (R., 79.) Carmack's real position was adequately stated by the District Judge in his oral opinion, in the following language:

> "As stated, I can readily see from sentimental as well as from financial reasons, that Mr. Carmack would like to become connected with the paper."
> (R., 115.)

When the Court looks through the corporate fiction it will appear that the entire effort to reorganize the corporation is by E. W. Carmack, Jr., personally, and that it arises out of his desire to acquire the newspapers for financial reasons. The courts always have disregarded the corporate fiction in the interest of justice and fair dealing.

> "The existence of the corporation as a distinct entity is a legal fiction, and where to recognize the corporation as a distinct legal entity will justify wrong, protect fraud, or defend crime, the law will disregard this fiction and view the corporation as an association of persons. *McCaskill Co.* v. *U. S.*, 216 U. S., 504, 30 S. Ct., 386, 54 L. Ed., 590; *U. S.* v. *United Shoe Machine Co.* (D. C.), 234 F., 127; *Smith* v. *Moore*, 199 F., 680, 118 C. C. A., 127; *Linn & Lane Timber Co.* v. *U. S.*, 196 F., 593, 116 C. C. A., 267; In re Watertown Paper Co., 169 F., 252, 94 C. C. A., 528; *U. S.* v. *Milwaukee Refrigerator Transit Co.* (C. C.), 142 F., 247; Fletcher, Cyclopedia of Corporations, Vol. I, § 42; 14 C. J., p. 61, § 22."
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> *Pierce* v. *National Bank of Commerce*, 13 F. (2d), at pp. 47-48.

> "The corporation will be regarded as a legal entity as a general rule, and the courts acting cautiously and

only when the circumstances justify it, will ignore the fiction of corporate entity, where it is used as a blind or instrumentality to defeat public convenience, justify wrong, or perpetrate a fraud, and will regard the corporation as an association of persons. *Peckett* v. *Wood*, (1916 C. C. A., 3d Cir.), 234 F., 833; *New York Trust Co.* v. *Carpenter* (1918, C. C. A., 6th Cir.), 250 F., 668." (Citing other cases.)

Majestic Co. v. *Orpheum Circuit*, 21 F. (2d), 720.

We, therefore, respectfully insist that this proceeding should in equity be regarded as having been instituted by E. W. Carmack, Jr., personally, as a stockholder, rather than by the corporate debtor.

The recent case of *In re Cosgrave*, 10 F. Supp., 672, involved a proceeding under Section 74 of the Bankruptcy Act. Here an individual filed a debtor's petition and recited that she was the owner of an apartment house in the City of Los Angeles, which was subject to a deed of trust to secure a large indebtedness. On an order to show cause the trustee under the deed of trust moved for a dismissal of the proceeding on the ground that it was not brought in good faith, as the statute required. The debtor was called as a witness and it developed that she had no interest in the apartment house prior to December 10, 1934, although she had resided, for the past few months, with her husband in the apartment house, and he was the bookkeeper for the company. It appeared that she had paid $300.00 in cash and had given notes aggregating $1,700.00, and had agreed to assume certain current expenses, which was to be complete payment for the equity in the property. Seven days later she filed the petition claiming relief under Section 74 of the Bankruptcy Act.

Prior to the time the petitioner acquired the equity in the apartment house the trustee under the trust deed had filed an action in the state court seeking the appointment of a receiver and the hearing on the motion for appointment of a receiver was set for December 17, 1934. The debtor's petition was filed on December 17, 1935, and while

she claimed that the apartment house was worth an amount in excess of the encumbrances the court concluded from certain affidavits that the property was not sufficient to pay off the mortgage indebtedness. Under these circumstances the District Judge held that the petitioner was not a *distressed debtor* within the meaning of the Bankruptcy Act but was in fact one who was speculating in equities and therefore the petition was not filed in good faith. The case is closely analogous to the one at bar, as will be seen from the following quotation:

> "The question here is: Can an individual suddenly acquire an equity in property for a nominal amount, and proceed immediately to claim the benefits of Section 74 of the Bankruptcy Act? The provisions of that section were intended to secure relief to persons who, engaged in any business, and finding themselves embarrassed by debts accumulated in the past, desire the opportunity to submit terms of compromise to their creditors. Speculators in equities surely were not within the contemplation of Congress when it drafted the section. The question of good faith is one which the court is obliged to consider—'good faith' means that the proceeding is brought by a person within the contemplation of the act, and under circumstances which warrant the assumption that some form of fair compromise may be worked out with creditor interests. The provisions were never intended to merely stay the hands of creditors, and leave unmolested the property in possession of the debtors who might continue to derive the income therefrom. The very fact that the petitioner acquired the equity in a large property at such a nominal figure contradicts in itself the assertion that the property has a value greatly in excess of the encumbrances against it. The facts and circumstances connected with the acquiring of the equity as shown here, demonstrate that the sole purpose of the dealings made by the petitioner was to enable her to prosecute a proceeding under Section 74, in order that the foreclosure of the trust deed encumbrances should be prevented."
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> *In re Cosgrave*, 10 F. Supp., at p. 673.

District Judge James, in the foregoing opinion, pointed out the fact that a similar decision had been reached with respect to an alleged farmer's petition in the United States District Court for the Western District of New York in the Matter of Fullagar, 8 F. Supp., 602. The petition was dismissed.

A similar situation was presented and discusssed by the Federal District Judge in *In re Philadelphia Rapid Transit Co.*, 8 Supp., 51, (affirmed without opinion, 73 F. (2d), 1022). In that case three persons had acquired the status of creditors and, as such, proceeded to file a petition under Section 77B of the Bankruptcy Act and, as in the case at bar, the petition was accompanied by a criticism of the previous management of the corporation's affairs, and plans for reorganization were proposed. The court said:

> "It is easy for any three persons to acquire the status of creditors so as to meet this requirement. The petitioners have done this but this is not enough. The petition must be 'in good faith.'"

Again the court said:

> "The comment we have made is directed to the meaning of Section 77B. We think it means that the proceeding provided is to be invoked either by the corporation concerned or by its creditors. This is the meaning of the 'good faith' phrase used in the act. It does not, as we have said, refer to the purity of the motives of the petitioners, nor, on the other hand, does it mean that the petitioners have merely technically qualified as creditors. They must be found to be speaking for the corporation or as creditors."

The duties of the District Judge in passing upon "good faith" were defined as follows:

> "There has been a compliance with the formalities. The act, however, requires more of the 'judge' than a certification to such compliance. He must find 'good faith.' This is more than a formality. It goes to the very vitals of the petition. If it is not a real creditors'

petition, although it may be signed by three persons who have the technical status of creditors, it is not 'in good faith' a creditors' petition. No better illustration could be found of the distinction attempted to be expressed than is afforded by this very petition."

After commenting on the fact that the petitioner and two others joined together and purchased certain bonds solely for the purpose of filing the petition, the court said:

"The mistake made was in assuming that, if he complied with all the formalities required by the act of Congress, he could bring himself within its provisions. He has overlooked the second requirement of substance that the petition must be 'in good faith' a creditors' petition. He has further assumed, as his counsel have argued, that the averments of the petition must be taken as verities until the facts have been judicially determined in accordance with the leisurely methods of legal procedure. He again has overlooked the requirement that the 'judge' must summarily determine the fact of compliance with the formalities and likewise the fact of 'good faith.'"

In conclusion the court found, as follows:

"The real purpose and motive behind the position existed before they became creditors *and they became creditors solely as an aid in the accomplishment of this purpose.* This was frankly admitted in the argument at bar. *They bought their way in as creditors and presumably can sell their way out.*

"The petition is not in truth a real creditors' petition and in this sense is not in good faith. Approval should in consequence be denied." (Italics ours.)

In re Philadelphia Rapid Transit Co., 8 F. Supp., at pp. 54-55.

The Circuit Court of Appeals for the Seventh Circuit has recently applied this principle in a 77B proceeding quite similar to the present case, in its decision in *In re North Kenmore Bldg. Corp.*, 81 F (2d), 656. In that case the mortgage indebtedness exceeded the value of the property.

A bill had been filed to sell the property under the first mortgage. The individual owners of the property quitclaimed to their attorneys, who in turn formed a corporation for the purpose of filing a proceeding for reorganization under Section 77B. Eighty-two per cent of the bondholders opposed the proposed reorganization as futile and the proceeding was dismissed by the Circuit Court of Appeals for the Seventh Circuit. In the course of the opinion, the court said:

> "That appellee has no equity in this property, other than of a speculative value, is a matter not open to serious doubt. In the matter of *In re Cosgrave* (D. C.), 10 F. Supp., 672, 673, Judge James, the learned Senior District Judge of the Southern District of California, in dismissing for lack of good faith a debtor's petition under section 74 of the Bankruptcy Act (as amended (11 U. S. C. A. § 202), said: 'Can an individual suddenly acquire an equity in property for a nominal amount, and proceed almost immediately to claim the benefits of section 74 of the Bankruptcy Act? The provisions of that section were intended to secure relief to persons who, engaged in any business, and finding themselves embarrassed by debts accumulated in the past, desire the opportunity to submit terms of compromise to their creditors. Speculators in equities surely were not within the contemplation of Congress when it drafted the section. . . . "Good faith" means that the proceeding is brought by a person within the contemplation of the act. . . . The very fact that the petitioner acquired the equity in a large property at such a nominal figure contradicts in itself the assertion that the property has a value greatly in excess of the encumbrances against it. The facts and circumstances . . . as shown here, demonstrate that the sole purpose . . . was to enable her to prosecute a proceeding under section 74, in order that the foreclosure . . . be prevented.'
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> "We think this is a fair statement of the purpose of section 74, and the language there used is applicable to the instant situation. The fact that more than 82 per cent of the bondholders, who are in fact the real owners of the property in question, have arrayed them-

selves in opposition to the proposed plan of this new corporation, also weighs heavily in the determination of the question of the good faith of the petitioner."

In re North Kenmore Bldg. Corp., 81 F. (2d), at p. 657.

In the cause of *In re Francfair, Inc.*, 13 F. Supp., 513, the District Judge dismissed the debtor's petition for reorganization under Section 77B, where the mortgage indebtedness exceeded the value of the property which was transferred to a corporation in exchange for the entire capital stock, the court saying:

"Moreover, a petition filed on January 15, 1935, to reorganize a corporation organized January 2, 1935, for the purpose of acquiring a piece of real estate already under foreclosure and encumbered by liens exceeding its value and transferred to it by trustees of a trust in consideration of all the stock of the corporation, the trust so far as the record shows being solvent and continuing in control of the property, cannot be considered to have been filed in good faith. Compare *Shapiro* v. *Wilgus*, 287 U. S., 348, 53 S. Ct., 142, 77 L. Ed., 355, 85 A. L. R., 128."

In re Francfair, Inc., 13 F. Supp., at p. 514.

Carmack, the owner of the entire common stock of the debtor corporation, is not a distressed debtor as contemplated by the Bankruptcy Act. He is not attempting to protect any fixed interest owned by him prior to the passage of Section 77B as an amendment to the Bankruptcy Act. He admits in his pleadings that he is interested in the reorganization for his own financial aggrandizement and that he acquired the common stock on the day before the properties were to be ordered sold for the purpose of having himself elected president of the corporation and filing the petition for reorganization. The previous owners of the common stock, whose acts had brought the corporation to a state of notorious insolvency, had not only abandoned all efforts to reorganize but had in fact abandoned the properties themselves. This court dealt with an analogous situation in *Shapiro* v. *Wilgus*, 287 U. S., 348, 77 L. Ed., 355, saying (at p. 355):

> "It would not gain validity when he transferred the business to another with a capacity for obstruction believed to be greater than his own."

It is submitted that the above statement from the opinion of Mr. Justice Cardoza aptly describes the situation in the present case, and that Carmack's own admissions convict him as a speculative adventurer in the equity of a notoriously insolvent corporation, which should bar him from the benefits claimed under Section 77B of the Bankruptcy Act.

II.

Reorganization Neither Feasible, Fair nor Practicable.

Under the provisions of Section 77B of the Bankruptcy Act a District Judge is given a wide discretion in determining whether or not the plans proposed are practicable or feasible. In the instant case the District Judge had himself administered the affairs of the debtor corporation for over two years under a receiver in a general creditors' proceeding. The liquidation under this proceeding had progressed to the point where only a sale of the properties remained to be accomplished and a hearing was set for the purpose of ordering such a sale on June 6, 1935. In all of these proceedings the debtor corporation was a party and participated freely therein, receiving notice of each step taken, and made no exceptions. A reference had been made to the Standing Master to ascertain the amount of the indebtedness, the liens, and status of all creditors, and extensive hearings had been completed and the Standing Master had filed his final report and, with the exception of certain immaterial disputed claims, his report had become final.

The amendment known as Section 77B had been on the statute books exactly one year prior to the date set for the order of sale. For several years prior to the receivership the corporation had operated its business at a large annual loss. The receiver, notwithstanding careful management, also was operating at a loss. The properties were of such a nature that any failure to publish the papers would result in certain and almost complete disaster. The

presses on which the papers are printed are old and out of repair. The receiver had borrowed money which has not been repaid and counsel fees, receiver's compensation and other costs must be paid. The assets, according to an appraisal relied on by the debtor, are worth only about $350,000.00. Its admitted liabilities exceed $1,000,000.00. The validity of the lien to secure the bonds and the amount due on the bonds have been judicially and finally determined in the receivership proceedings. Th District Judge's comment was that the debtor was "notoriously insolvent."

Under these circumstances Paul M. Davis, one of the bondholders, came forth and made an offer to pay $400,000.00 in cash for the assets covered by the bonds and $40,000.00 for the free assets, and agreed that this offer might be used as a starting bid if the court desired to sell the property at public auction. This figure was $140,000.00 more than the debtor was offering in its various plans of reorganization.

The foregoing facts were commented on by the District Judge in his final opinion delivered October 23, 1935. The District Judge in the exercise of his sound discretion refused to permit the equity receivership proceedings to be undone and pointed out that none of the bondholders had approved the plan, more than two-thirds of the bondholders had filed pleadings to reject the plan, more than 50 per cent of the unsecured creditors had done likewise, and that under all of the circumstances a judicial public sale of the properties was inevitable, and for this reason he dismissed the petition so that they might be sold in the equity case.

The Circuit Court of Appeals described the debtor's situation as follows:

> "It appears from the record that the total assets of the debtor upon fair appraisal are worth less than $300,000. The bonded indebtedness exceeds $900,000.00, and the unsecured indebtedness is more than $300,000. To this must now be added the cost and expenses of the receivership. Moreover, the receiver has been operating at a loss, and the debtor concedes

> that it also will for a time operate at a loss, its most optimistic undertaking being, if the property is restored to it, to reduce current losses 25 per cent. When these figures are considered together with the vagueness of detail in the proposed plan, the doubt that exists as to whether under Section 77B there may now be a reopening of the adjudication of the claims against the debtor in the equity proceeding it seems clear to us that the proposed plan is not a workable plan, offers no reasonable prospect for successful rehabilitation of the debtor, and is in consequence not, in the sense the phrase is used in the section, presented in good faith." (R., 157.)

The District Judge and the Circuit Court of Appeals are supported in these conclusions by both common-sense reasoning and precedent.

In the case of *In re 235 West 46th Street Co., Inc.*, 74 F. (2d), 700, the Circuit Court of Appeals for the Second Circuit was dealing with the following situation:

After a mortgage foreclosure had been commenced by the first mortgagee on property known as the Paramount Hotel in New York City and a receiver of the properties had been appointed by the state court, the debtor filed a petition under Section 77B of the Bankruptcy Act and the District Judge entered an order permitting it to be filed. The application was opposed by the mortgagee upon the ground that there was not equity above the first mortgage and that a sale thereunder was inevitable. There were a number of adjournments and in all four plans of reorganization were submitted. It was admitted that the mortgage indebtedness exceeded the value of the property and that the hotel was being operated at a loss. In holding that the petition should be dismissed the appellate court said:

> "The difficulty would seem to be that the first lien on this property, and the arrears of interest and taxes, leave no equity. The hotel and restaurant business has been unprofitable. It appears that the trustee now named managed the property for three years and three months while the first mortgage was in default of in-

terest and taxes, and under his management the property consistently failed to pay taxes and interest on the first mortgage to the extent of $330,000. Full opportunity has been allowed for the submission of plans. The extraordinary powers possible to utilize under Section 77B have not been of assistance to appellees. We are not warranted in believing that there is a reasonable prospect for a reorganization beneficial to all. To grant more time, there must be a showing that there is a fair opportunity to sustain the appellee's claim that the corporation can be reorganized for the benefit of all. We think the liberal powers conferred by the section and their exercise in enjoining foreclosure of the first mortgage should no longer stay the appellants. It would be an abuse of the powers granted by Section 77B, under the circumstances found in the case, to further stay the appellants in the hope that eventually some other plan of reorganization might be proposed."

In re 235 West 46 Street Co., Inc., 74 F (2d), at pp. 701-702.

In the case of *In re Williamsport Wire Rope Co.*, 10 F. Supp., 481, (approved and appeal dismissed, 78 F. (2d), 1023), the debtor corporation, as in the case at bar, had been administered in an equity receivership cause for about two years, in which cause its affairs had been practically liquidated. When the debtor filed the petition in bankruptcy it was opposed by the bondholders who were interested in working out their rights in the equity receivership cause, upon the ground that it was not in good faith within the meaning of Section 77B because there was no reasonable hope of obtaining acceptance of the plan in the amount required by the statute; because the plan, unless accepted by the requisite number of bondholders and creditors, could not be confirmed by the court; and because the plan itself was not feasible and there was no reasonable prospect of its success. Notwithstanding an apparent equity over the indebtedness in favor of the stockholders, the court dismissed the debtor's petition as not filed in good faith, with the following comment:

"The present receivership in equity has been and is making progress. This court is not averse to reorgani-

zation, yet it is not disposed to terminate the receivership in equity and place the Williamsport Wire Rope Company in the hands of trustees under Section 77B until there is at hand an adequate offer, based on a feasible, practicable, and acceptable plan which will result in a fairly speedy reorganization with likelihood of success and which will adequately protect all the investors and creditors as their relative interests merit.

"The court is of the opinion that it will result in confusion and uncertainty of policy to terminate the equity receivership and place the Williamsport Wire Rope Company in the hands of trustees under Section 77B based only on the present company plan which is not adequate, feasible, or acceptable.

"Detailed requests for findings of fact and conclusions of law have been submitted. They are answered and filed herewith and made a part of this opinion.

"For the reasons above stated, the court is of the opinion that the petition for reorganization under Section 77B was not filed in good faith and should be dismissed."

In re Williamsport Wire Rope Co., 10 F. Supp., at p. 482.

The case of *Manati Sugar Co.* v. *Mock*, 75 F. (2d), 284, is directly in point. In that case the properties were widely scattered and were subject to first mortgage bonds exceeding $5,000,000.00. A receiver in equity was appointed on February 9, 1932, and it continued the business under the authority of the court, arranging for the necessary credit to do so. Default had occurred in the principal and interest under the bonds. The debtor was without working capital and was dependent upon bank loans.

The petitioner creditors who sought reorganization under Section 77B of the Bankruptcy Act owned $14,000.00 of the principal amount out of the total bonds exceeding $5,000,000.00. The petition strictly conformed to the averments required by the statute. The petition was dismissed, however, as not being filed in good faith and the court defined the requirements of good faith as follows:

"To conclude that a petition is filed in good faith, there should be a showing, found within it, of a need for a reorganization. The good-faith provision of the statute is not satisfied merely by honesty and good intentions. There must be a showing that the petitioners have a basis for expecting that a reorganization can be effected. Where the object is reorganization, rather than liquidation, the petitioner should furnish some assurance, by allegations at least, that they reasonably expect a fairly general support for their proposed plan or promised plan. Otherwise there would be little to be expected in the undertaking of assuming responsibility for a reorganization.

. . . . . .

"But it must appear that there is reasonable probability that a reorganization will be effected. In other words, the question presented is whether there may be reasonably applied to the debtor some feasible and practicable plan of reorganization. If not, there is no occasion to invoke the benefits of the act."

Manati Sugar Co. v. *Mock*, 75 F. (2d), at p. 285.

The court concluded upon the facts first above stated that there was no reasonable prospect of a successful reorganization and hence the petition was dismissed.

Who is better qualified to exercise a sound discretion in the case at bar than the District Judge in whose court for more than two years the affairs of the Debtor corporation have been liquidated under an equity receivership? After a general survey of the situation he, for the reasons announced in his final opinion, determined that a sale of the properties was inevitable and he dismissed the debtor's petition as not being filed in good faith, because it was impracticable and not feasible, and for the purpose of permitting a sale of the properties in the equity receivership cause. In so doing he was amply supported by the facts as we have pointed out and it can not be disputed that such dismissal was required by the legal principles set out in the foregoing cases.

III.

No Error in Concurrent Findings of the District Court and Circuit Court of Appeals.

Sub-section (f) of Section 77B of the Bankruptcy Act provides that the District Judge shall confirm a plan of reorganization if he is satisfied "that it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible." If the District Judge reaches the conclusion that the proposed reorganization is unfair, inequitable, discriminatory, or not feasible, he is authorized to dismiss the proceeding under sub-section (c) (8) of Section 77B of the Bankruptcy Act.

In ascertaining the basis of the District Judge's action in dismissing the proceeding, it is important for the court to bear in mind that while an oral opinion was delivered by the District Judge on October 15, 1935, the final opinion, in which the District Judge summarized his entire position, was delivered on October 23, 1935. (R., 121-123.) For the convenience of the court we here quote the statements of the District Judge made in the course of his final opinion, which clearly indicate his reasons for dismissing the proceeding:

> (1) "I believe it would manifestly be unjust to the bondholders to undo what has been done in the equity proceedings of the case of *Carpenter, Receiver* v. *Tennessee Publishing Company.* In that case the validity and amount of the bonds outstanding was established. The debtor was a party to that suit; the question was submitted to the Standing Master and he made his report covering that question. The report, I am informed, is unexpected to. Hence it would result in a very great injustice to everyone to reconsider the validity and amount of the bonds, and undo what has been done in that case. These two cases have been going along together, and being tried and considered together, in all the hearings that have been before the Court."
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> (R., 122.)
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> (2) "It is admitted, and in fact, is abundantly shown by the report of the Standing Master in the.

equity case, that the debtor is notoriously insolvent."
(R., 122.)

(3) "In view of the bankrupt condition of debtor, I am unable to see how the bondholders could possibly realize the value of their bonds, or how the value of the bonds are to be ascertained except by a public sale of debtor's property securing same. It appears to me that the effect of the last plan is to disregard what has been done in the equity receivership case, and to delay a final administration of the debtor's estate indefinitely."
(R., 122.)

(4) "None of the bondholders are willing to adopt the plan; more than two-thirds of the bondholders have by pleadings, affirmatively rejected it, and more than 50 per cent of the unsecured creditors have affirmatively declined to accept the plan. If I should adopt it; or, if I should overrule the motion to dismiss the petition, it would amount to cramming down the throats of these secured creditors, a plan which they almost unanimously reject. I would be taking from them a substantive right that they have in the property, and the very best that could be said of it—the best excuse that the Court could offer—would be that it would postpone their right to a public sale of the property to such time as the Court might see fit to sell it. That is the most liberal construction in favor of the plan."
(R., 122-123.)

(5) "In view of the financial condition of debtor, a sale of its property is inevitable. . . ."
(R., 123.)

(6) ". . . and if I should adopt the last plan of the debtor which provides for scalding down of the face value of the bonds from one dollar to eighty cents, and returning the property to debtor, subject to the lien now existing in favor of the bondholders after crediting same with twenty cents on the dollar, and the court to fix a rate of interest the debtor is to pay upon said bonds after crediting the same aforesaid, and if the court should judicially determine the value of the bonds which are held by bondholders who are unwilling to accept eighty cents on the face value thereof,

which amounts so fixed shall be declared to be the value of said bonds. Or, in the event the holders of said bonds are not willing to take the amounts thus fixed by the Court, in that event, the debtor to retain possession of its property subject to the lien now existing thereon to secure whatever amount the Court may determine is due would be, as announced by the Supreme Court in the case of *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S., 555, depriving the bondholders of substantive rights which cannot legally be done."

(R., 123.)

(7) "I can see no alternative except to dismiss the petition, and let the property be sold in the equity case."

(R., 123.)

The District Judge, at the time of this pronouncement, had before him the debtor's proposals based generally upon the appraisal of the properties covered by the mortgage at approximately $300,000.00, *and also had before him the offer to Paul M. Davis to pay $400,000.00 for these same properties and $40,000.00 for the assets not covered by the lien of the bonds and to permit his offer to be used as an upset bid if the properties were sold in the equity case.*

(R., 100A-100B.)

We have heretofore quoted the statement of the learned Circuit Court of Appeals concurring in the foregoing findings of the District Judge that the financial condition of the debtor was such as to require a sale in the equity proceeding at the earliest moment.

(R., 157.)

The statement of the District Judge set out in paragraph (3) above is of controlling importance in view of subdivision (b), clause (5) of Section 77B, which places the duty upon the District Judge of seeing that any plan provides adequate protection to creditors for the realization of the value of their interests

"... (1) by such method as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection."

In the case of *In re Preble Corp.*, 84 F. (2d), 73, (*certiorari* granted and now pending in this Court), the Circuit Court of Appeals for the First Circuit refused to confirm a plan of reorganization filed by the debtor, which provided that dissenting bondholders were to receive the appraised value of their claims, although the value of the real estate was found to be less than the mortgage debt, and applied the test established by Judge Learned Hand in the case of *In re Murel Holding Corp.*, 75 F. (2d), 941. The Circuit Court of Appeals quoted and approved the following statement of the District Judge:

> "'A plan may not be confirmed if it is not fair and equitable, or if it discriminates in favor of one class of creditors or stockholders or is not feasible. In such a case as this, to take the property from the mortgagee upon an appraisal is an attempt to use a supposed or possible value, over and above the appraisal, for the benefit of other creditors and stockholders. If there is any such surplus value, it belongs to the first mortgagee, up to the amount of his debt. If there is none, there is nothing to build on, and there would seem to be no object in having an appraisal, in the absence of a disclosure of a method of raising the money, unless junior interests are prepared to advance the money on a chance of increased value in the future, and there is no information before the court to that effect. A plan cannot be called either fair or feasible which discloses no method or probability of being carried out unless, perchance, the appraisers make a mistake in valuation.' We agree with this view, and it is decisive."

Likewise, in *Francisco Bldg. Corp., Ltd.*, v. *Battson*, 83 F. (2d), 93, the Circuit Court of Appeals for the Ninth Circuit refused to confirm a plan of reorganization proposed by the debtor over objections of the bondholders, which provided for the surrender of all outstanding bonds and the issuance of new income bonds. The facts relating to insolvency of the debtor were analogous to those in the case at bar and the operation by the trustee in possession of the properties was not producing sufficient net income to pay the accrued interest on the first mortgage bonds.

Ninety-two per cent of the bondholders objected to the plan and the District Judge sustained their objections and dismissed the proceeding. The Circuit Court of Appeals said:

> "It is too obvious to require discussion that there is no abuse of discretion in refusing to approve the proposed plan of reorganization. *In re Murel Holding Corporation, supra; In re Coney Island Hotel Corporation, supra.* We therefore content ourselves with citing a number of additional authorities bearing on the question. *In re Central Funding Corporation* (C. C. A.), 75 F. (2d), 256; *In re Murel Holding Corporation* (C. C. A.), 75 F. (2d), 941; *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S., 555, 55 S. Ct., 854, 79 L. Ed., 1593, 97 A. L. R., 1106; *In re North Kenmore Building Corporation,* 81 F. (2d), 656, decided by the United States Circuit Court of Appeals for the Seventh Circuit, January 31, 1936; *Central States Life Ins. Co.* v. *Koplar Co.,* 80 F. (2d), 754, decided by the United States Circuit Court of Appeals for the Eighth Circuit, December 17, 1935."

The point we are now presenting is wholly aside from the *constitutional question,* which will be presented in Section IV of this brief. The District Judge was of the opinion that in view of the bankrupt condition of the debtor the bondholders could not possibly realize the value of their bonds except through a public sale of the debtor's properties under the trust indenture, and that such was the only fair and feasible method of determining the value of the bonds. The Circuit Court of Appeals concurred. The case therefore falls within the principle announced by this Court in *Continental Illinois Nat'l. Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.,* 294 U. S., 648, 79 L. Ed., 1110, in which Mr. Justice Sutherland said, *at page 1129:*

> "It is evident that the effect here wrought by the menace of impending sales of the collateral would seriously embarrass and probably prevent the formulation and consummation of a plan of reorganization. Both courts below so found. The findings of the district court are in the form of recitals in the order, but are nevertheless in substance and in effect findings of fact.

> The circuit court of appeals approved these findings, and added that without some control over the disposition of the collateral, 'the presentation of a satisfactory plan of reorganization might as well be abandoned.' These concurrent findings of the two courts, as this court has often held, should be accepted as conclusive unless clearly erroneous. *United States* v. *Commercial Credit Co.*, 286 U. S., 63, 67, 76 L. Ed., 978, 980, 52 S. Ct., 467; *Stuart* v. *Hayden*, 169 U. S., 1, 14, 42 L. Ed., 639, 643, 18 S. Ct., 274; *Dun* v. *Lumbermen's Credit Asso.*, 209 U. S., 20, 23, 24, 52 L. Ed., 663, 665, 666, 28 S. Ct., 335, 14 Ann. Cas., 501."

IV

Bondholders' Substantive Rights in the Specific Properties.

The District Court and the Circuit Court of Appeals concurred in holding that as a matter of law the various plans of reorganization offered by the debtor violated the constitutional rights of the bondholders in that they sought to deprive the bondholders of substantive rights in the specific properties without their consent. Both courts based their opinions on the unanimous opinion of this court in *Louisville Joint Stock Land Bank* v. *Radford* 295, U. S., 555, 79 L. Ed., 1593, in which certain retroactive provisions of the Frazier-Lemke Act were declared invalid.

The amendment to the Bankruptcy Act known as Section 77B *is retroactive by its terms.* Sub-section (p) provides:

> "This section shall take effect and be in force from and after the date of the approval of this amendatory Act *and shall apply as fully to debtors, their stockholders and creditors, whose interests or debts have been acquired or incurred prior to such date,* as to debtors, their stockholders and creditors, whose interests or debts are acquired or incurred after such date. Proceedings under this section may be taken in proceedings in bankruptcy which are pending on the effective date of this amendatory Act."

The bonds involved in this controversy, aggregating in principal amount $750,000.00, were issued by Tennessee

Publishing Company on November 1, 1928, and were secured by a contemporaneous deed of trust constituting a first mortgage on the physical assets and properties of the debtor corporation. Section 77B was added to the Bankruptcy Act by the 73d Congress and it became effective June 7, 1934. Prior to the time of the enactment of this amendment the debtor corporation had made various defaults in the payment of interest, sinking fund, and other provisions and conditions under the indenture, and C. O. Carpenter, Receiver of Holston-Union National Bank, of Knoxville, Tennessee, the holder of $28,000.00 in principal amount of said bonds, had filed a bill in the United States District Court for the Middle District of Tennessee, asserting the right of the bondholders to a judicial public sale of the properties because of such defaults, and the court had placed the properties in the possession of a receiver for the purpose of liquidation and sale. All of the other bondholders joined in the proceeding and it was sustained as a general creditors' bill. This occurred more than a year prior to the passage of Section 77B as an amendment to the Bankruptcy Act.

Upon the filing of the debtor's petition and during the course of the various steps taken in the District Court, bondholders owning and holding more than seventy-two per cent of the outstanding issue intervened in the cause and expressly declined to consent to any of the plans of reorganization, asserting, in addition to the practical grounds for rejection hereinbefore set out, that the plans if approved would deprive them of their substantive rights in the specific properties of the debtor acquired prior to the passage of Section 77B as an amendment to the Bankruptcy Act, and would be in violation of the Fifth Amendment to the Constitution of the United States.

While the various plans proposed by debtor baffle complete analysis, we have heretofore undertaken in a previous portion of this brief to state their principal provisions. It is submitted that the following statements can not be disputed in the record:

(1) The bonds are dated and were issued on November 1, 1928, in the principal sum of $750,000.00, and are secured by a registered deed of trust, which, under the laws of Tennessee, constitutes a first lien on the debtor's properties. The principal of the bonds, to-wit, $750,000.00, and interest in the sum of $139,375.00 (as of July 1, 1935), are due and unpaid.

(R., 19-20.)

(2) The debtor is seeking by its plans of reorganization to require the cancellation of the sinking fund provisions contained in the trust indenture and the release of the lien to secure the same, without the consent of any of the bondholders and notwithstanding the affirmative disagreement of more than two-thirds of such bondholders.

(3) The debtor's plans further require the cancellation of all accrued and past due interest ($139,375.00 as of July 1, 1935, plus subsequently accrued interest), and the release and surrender by the bondholders of their lien against the specific properties to secure the payment of such interest, without the consent of any of the bondholders and over the affirmative objection of more than two-thirds thereof.

(4) The debtor seeks also to require the acceptance by the bondholders of the appraised value of the properties covered by the indenture; or, in the alternative,

(5) The debtor demands the scaling down of the principal amount of the bonds either to the appraised value of the bonds based on an appraisal of the properties or to the amount paid by the last purchaser, and a cancellation and surrender of the lien of the indenture against the debtor's properties to the extent of such reduction, without the consent of any of the bondholders and over the affirmative objection of more than two-thirds thereof.

(6) A compulsory revision of the interest rate provided under the indenture (presumably by a reduction) and a surrender and cancellation of the lien against the specific

properties to the extent of such revision, without the consent of any of the bondholders and over the objection of more than two-thirds thereof.

(7) A compulsory extension of the time for the payment of the past due bonds to a future date (apparently a number of years hence) in the reduced principal amount, a different and less rate of interest, with all existing sinking fund provisions eliminated, without the consent of any of the bondholders and over the affirmative objections of more than two-thirds thereof.

It is therefore respectfully insisted that the debtor's proposals take from the bondholders the following substantive rights in the debtor's specific properties:

(1) The right to retain the lien until the indebtedness thereby secured is paid.

(2) The right to realize upon the security by a judicial public sale, or by the Trustees, as provided in said indenture.

(3) The right to determine when such sales shall be held, subject only to the discretion of the court and to the terms and conditions of said indenture.

(4) The right to protect its interest in the property by bidding at such sale whenever held and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of proceeds of a fair competitive sale, or by taking the property itself.

(5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt.

The rights above enumerated are those which were stated by this court in the recent case of *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S., 555, 79 L. Ed., 1593.

In the *Radford* case this court unanimously held that certain provisions of the amendment known as Section 75

of the Bankruptcy Act (Frazier-Lemke Act) were violative of the Fifth Amendment to the Federal Constitution insofar as they related to lien debts existing at the time the Act became effective. Section 77B of the Bankruptcy Act is likewise retroactive. (See section (p).) The rights of the bondholders in the present case were acquired in 1928, prior to the passage of Section 77B as an amendment to the Bankruptcy Act. The respondents do not contend that Section 77B of the Bankruptcy Act is invalid or unconstitutional in its general scope and application. The debtor, in the present case, is seeking to force the bondholders to surrender the substantive rights enumerated above, without their consent, and claims the right to do so under the provisions of sub-section (b) (5), Section 77B of the Bankruptcy Act. The debtor insists that under this section of the Act it is not required to obtain the consent of the bondholders, or any part thereof, if its plans provide for an appraisal and payment either in cash of the value either of such interest, claims or liens, or, at the objecting creditors' election, of the securities allotted to such interest, claims or liens under the plan, if any shall be so allotted. The bondholders deny the right of the Congress to *retroactively* grant any such right or rights to the debtor and assert that the section in question, if construed and applied in accordance with the debtor's contention, is unconstitutional and violative of the Fifth Amendment to the Federal Constitution.

In the *Radford* case this court said:

> "The bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment. Under the bankruptcy power Congress may discharge the debtor's personal obligation, because, unlike the states, it is not prohibited from impairing the obligations of contracts. Compare *Mitchell* v. *Clark*, 110 U. S., 633, 643, 4 S. Ct., 170, 312, 28 L. Ed., 279. But the effect of the act here complained of is not the discharge of Radford's personal obligation. It is the taking of substantive rights in specific property acquired by the bank prior to the act. In order to determine whether rights of that nature have been taken, we must ascertain what the mortgagee's rights were be-

fore the passage of the act. We turn, therefore, first to the law of the state."

295 U. S., pp. 589-590, 79 L. Ed., at pp. 1604-5.

It is conceded in the present litigation that the substantive rights of the bondholders are identical with those found by the court in the *Radford* case to exist under the laws of Kentucky. Referring to the Frazier-Lamke Act, the court rendered its decision in the following language:

> "Its avowed object is to take from the mortgagee rights in the specific property held as security; and to that end 'to scale down the indebtedness' to the present value of the property. As here applied it has taken from the Bank the following property rights recognized by the law of Kentucky:
>
> "(1) The right to retain the lien until the indebtedness thereby secured is paid.
>
> "(2) The right to realize upon the security by a judicial public sale.
>
> "(3) The right to determine when such sale shall be held, subject only to the discretion of the court.
>
> "(4) The right to protect its interest in the property by bidding at such sale whenever held, and thus to assure having the mortgaged property devoted primarily to the satisfaction of the debt, either through receipt of the proceeds of a fair competitive sale or by taking the property itself.
>
> "(5) The right to control meanwhile the property during the period of default, subject only to the discretion of the court, and to have the rents and profits collected by a receiver for the satisfaction of the debt."
>
> *295 U. S.*, pp. 594-595, 79 L. Ed., at p. 1607.

The argument made by debtor to the effect that no right of any value was taken from the lienholder since his interest was limited to the value of the property and that if under a fair appraisal he received the actual value of the property no complaint could be made, was answered by Justice Brandeis in the following language:

> "The contention rests upon the unfounded assertion that its only substantive right under the mortgage is to

have the value of the security applied to the satisfaction of the debt. It would be more accurate to say that the only right under the mortgage left to the bank is the right to retain its lien until the mortgagor, sometime within the five-year period, chooses to release it by paying the appraised value of the property."

295 U. S., p. 596, 79 L. Ed., at p. 1608.

The court, in conclusion, said:

"The province of the Court is limited to deciding whether the Frazier-Lemke Act (11 U. S. C. A. § 203 (s)) as applied has taken from the bank without compensation, and given to Radford, rights in specific property which are of substantial value. Compare *Ochoa* v. *Hernandez y Mocales*, 230 U. S., 139, 161, 33 S. Ct., 1033, 57 L. Ed., 1427; *Citizens' Savings & Loan Association* v. *Topeka*, 20 Wall., 655, 662, 22 L. Ed., 455; *In re Dillard*, 7 Fed. Cas., page 706, No. 3,912. As we conclude that the act as applied has done so, we must hold it void; for the Fifth Amendment commands that, however great the nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public."

295 U. S., pp. 601-602, 79 L. Ed., at p. 1611.

After the announcement of the decision of this court in the *Radford* case, Congress amended the Frazier-Lemke Act so as to provide for the cancellation of the lien indebtedness by the payment of the appraised value only in the event the holders of the lien indebtedness consented. If the lien holders declined to accept the appraised value the debtor was left in possession for a maximum period of three years, conditioned upon the payment of a certain rental to the lien holders, with the right to a judicial public sale in favor of the lien holder upon the happening of certain contingencies. The Federal Courts, following the principles announced in

the *Radford* decision, have quite generally held the amended Frazier-Lemke Act unconstitutional insofar as it is retroactive.

In re Lowmon, 79 F. (2d), 687.
In re Young, 12 F. Supp., 30.
In re Sherman, 12 F. Supp., 297.
In re Tschoepe, 13 F. Supp., 371.
In re Schoenleber, 13 F. Supp., 375.
In re Davis, 13 F. Supp., 221.
In re Diller, 13 F. Supp., 249.

The petitioner apparently concedes that it is seeking by its various plans to take from the bondholders the five substantive rights enumerated by this court in the *Radford* case and heretofore set out in this brief, and that it seeks to do so without the consent of any of the bondholders and over the affirmative objection of more than two-thirds thereof. It points to sub-section (b) (5) as authority for its position. We submit that upon this construction and in the light of the undisputed facts of the present case, sub-section (b) (5), if so applied, would be clearly a violation of the Fifth Amendment to the Constitution of the United States.

The *requirements* of the third plan of reorganization, effectively deprive the bondholders of the five substantive rights in the specific properties, just as the previous plans had done. We have summarized the requirements of this last proposed plan in the foregoing pages of this brief at pages 17 to 19, and have shown that it requires the cancellation of accrued interest exceeding $140,000.00, the release of sinking fund provisions, and the perpetual discharge of the bondholders' lien against the specific properties to the extent that it secured this interest and the sinking fund provisions. It requires the bondholders to accept the appraised value of the properties notwithstanding an offer was filed in the cause exceeding the appraised value by a substantial sum, or to consent to a scaling down of the principal to the sum paid for the bonds by the last purchaser irrespective of the amount received by the debtor at the time the bonds were issued. The interest is to be reduced and the maturity of the bonds is to be extended to

some indefinite period in the future and the lien of the indenture modified accordingly.

The entire plan was conditioned upon the denial of a judicial public sale to the bondholders notwithstanding the admitted default. It would deprive the bondholders of their admitted substantive property rights under the laws of Tennessee as stated by Circuit Judge Simons in the opinion of the Circuit Court of Appeals, as follows:

> "Here, under Tennessee law, as there under Kentucky law, the lien holders had the right under their contract to retain the lien until the indebtedness secured was paid, the right to realize upon the security by a judicial public sale, the right to determine when such sale should be held, subject only to the discretion of the court, the right to protect their interest in the property by bidding at such sale, the right to have the mortgaged property devoted primarily to the satisfaction of the debt, and the right to control the property meanwhile during the period of default, subject only to the discretion of the court, and to have the rents and profits during such period applied to the satisfaction of the debt. These rights are substantive property rights, and any invasion of them under the authority of the present statute is as clearly violative of the due process clause of the Fifth Amendment as it was in the Radford case."
>
> (R., 159.)

In discussing a similar plan of reorganization proposed under sub-section (b) (5), sub-division (d), Section 77B of the Bankruptcy Act, Judge Learned Hand, of the Circuit Court of Appeals for the Second Circuit, in the case of *In re Murel Holding Corp.*, 75 F. (2d), 941, at p. 942, said:

> "It is plain that 'adequate protection' must be completely compensatory; and that payment ten years hence is not generally the equivalent of payment now. Interest is indeed the common measure of the difference, but a creditor who fears the safely of his principal will scarcely be content with that; he wishes to get his money or at least the property. We see no rea-

son to suppose that the statute was intended to deprive him of that in the interest of junior holders, unless by a substitute of the most indubitable equivalence."

It is therefore respectfully submitted that the District Judge and the Circuit Court of Appeals were eminently justified in reaching the conclusion that the plans of reorganization proposed by the debtor in this cause, insofar as understandable, were violative of the constitutional rights of the bondholders and justified the dismissal of the proceedings.

REPLY TO CERTAIN CONTENTIONS OF PETITIONER.

The petitioner seems to rest certain of its contentions on the present hearing upon the following statement found in its petition, at page 39b:

> "There is no deprivation of property in any real sense when secured creditors are compelled by law, such as Section 77B, to accept, in place of their contract rights against the bankrupt estate, something which the Court finds, under the circumstances, to be the equivalent."

The authority shown for this statement is the decision in *Campbell* v. *Allegheny Corporation*, 75 F. (2d), 954. The latter case was decided on March 2, 1935, prior to the decision of this Court in *Louisville Joint Stock Land Bank* v. *Radford, supra*, and involved a case where the holders of seventy-seven per cent of the bonds affected by the plan had accepted it in writing. The Court approved the constitutionality of the statute upon the theory of a composition consented to by a majority of a class of creditors. The situation in the present case is just the reverse. More than seventy-two per cent of the bondholders have declined to agree to the plan, and more than fifty per cent of the unsecured creditors have likewise disapproved the plan. However, wholly aside from these considerations, this Court disapproved the petitioner's insistence (above quoted) with respect to the substitution of equivalent values, Justice Brandeis pointing out in the *Radford* case that:

> "The contention rests upon the unfounded assertion that its only substantive right under the mortgage is to have the value of the security applied to the satisfaction of the debt."
>
> 295 U. S., at p. 596, 79 L. Ed., at p. 1608.

Apparently the petitioner also is proceeding upon the theory that Congress may authorize the taking of substantive property rights of the bondholders without a violation of the Fifth Amendment to the Federal Constitution if ade-

quate compensation is given therefor. It was insisted in the *Radford* case that the rights of the lien holders in farm property were taken for a public purpose and that this was justified if rights of equivalent value were substituted. This Court, however, in the course of its opinion in the *Radford* case, pointed out:

> "But the Frazier-Lemke Act does not purport to exercise the right of eminent domain; and neither the law of Kentucky nor Radford's mortgages contain any provision conferring upon the mortgagor an option to compel, at any time within five years, a release of the farm upon payment of its appraised value and a right to retain meanwhile possession, upon paying a rental to be fixed by the bankruptcy courts."
>
> *Louisville Joint Stock Land Bank* v. *Radford*, 295 U. S., at p. 596, 79 L. Ed., at p. 1608.

Section 77B of the Bankruptcy Act does not purport to exercise the right of eminent domain and it is conceded that under the law of Tennessee and the debtor's indenture the bondholders, because of various defaults, have the right of an immediate public sale and the right to appear and bid the property in and have it devoted primarily to the satisfaction of their debt, either through the receipt of the proceeds of a fair competitive sale or by the taking of the property itself. Certainly it can not be reasonably claimed that Congress could condemn the substantive property rights of bondholders for the benefit of a private corporation engaged in a private commercial enterprise. Property can only be condemned for a public use, and manifestly a private commercial enterprise, such as the publication of a newspaper, is not a public use.

> (Compare *United States* v. *Certain Lands in City of Louisville*, 78 F. (2d), 684.)

It is further insisted that the provisions of sub-section (c) (5) of Section 77B are substantially the same as those contained in sub-section (e) of Section 77 of the Bankruptcy Act which this Court upheld as an act on the general subject of bankruptcy in the case of *Continental Illinois Nat'l. Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Ry. Co.*, 294 U. S., 648, 79 L. Ed., 1110. Section 77 of the Bankruptcy

Act deals wholly with the reorganization of railroads, which are affected with a public interest, but aside from this consideration it is to be noted that the petitioner, in referring to sub-section (e) of Section 77 of the Bankruptcy Act, has failed to take into consideration the provisions immediately following those quoted by the petitioner, as follows:

> "*Provided*, That, *if the plan has not been so accepted by the creditors* and stockholders, the judge may nevertheless confirm the plan *if he is satisfied and finds, after hearing*, that it makes adequate provision for fair and equitable treatment for the interests or claims of those reejcting it; that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts; *and that the plan conforms to the requirements of clauses (1) to (3), inclusive, of the first paragraph of this subsection (e).*"

"The requirements" in clauses (1) to (3) are the provision that the judge can approve the plan only if he is satisfied that:

> "(1) It complies with the provisions of sub-section (b) of this section, is fair and equitable, *affords due recognition to the rights of each class of creditors*, and stockholders, does not discriminate unfairly in favor of any creditors or stockholders, *and will conform to the requirements of the law of the land* regarding the participation of the various classes of creditors and stockholders; . . ."

It appears therefore that the Railroad Reorganization Act places upon the judge the affirmative duty of seeing that the plan does not violate the substantive property rights of any of the creditors as guaranteed by the Fifth Amendment to the Federal Constitution.

There is no contention in this case that Section 77B is not a valid law upon the general subject of bankruptcy, the insistence on the constitutional phase relating only to subsection (b) (5) as sought to be applied by the debtor in this case.

In support of its statement that it was acting in good faith, the debtor urges as evidence thereof that it could not anticipate that the Court would hold sub-section (b) (5) unconstitutional. The argument is that until the Court had actually declared the above provision invalid the debtor had the right to assume it to be valid and that such conclusion does not warrant the imputation of bad faith. The error of the argument lies in the fact that the debtor makes no distinction between honesty of motive and the existence of a reasonable possibility of a successful reorganization. The District Judge and the Circuit Court of Appeals predicated the dismissal of the debtor's proceedings not alone on the violation of the bondholders' substantive rights but also upon the fact that the debtor was so notoriously insolvent and the receivership was so obviously losing money that it would be unwise and improper to longer defer the inevitable sale of the properties which had already been administered under an equity receivership proceeding for more than two years prior to the filing of the debtor's petition. The debtor itself was a party to the equity receivership cause and all of these facts and circumstances were well known to it and certainly were known and fully appreciated by Carmack, who admits that he acquired the common stock of the debtor corporation *on the day before the sale was to be ordered in the equity proceeding.* The contention also overlooks the fact that the *Radford* decision was announced by this Court on May 27, 1935, and was given wide publicity as it invalidated a companion statute of Section 77B. Carmack purchased his interest in the notoriously insolvent corporation after the *Radford* decision and his contention has no merit on the facts of the case assuming it to be of legal consequence.

The insistence of petitioner that the Circuit Court of Appeals was without jurisdiction to pass upon the question of debtor's good faith is without merit. It is true that upon the filing of the debtor's petition on June 6, 1935, an order was entered by the District Judge allowing it to be filed and reciting that it had been filed in good faith. This same order, however, in a subsequent paragraph issued a rule permitting creditors to appear and show cause, if any, whether or not the petition should be dismissed.

(R., 1.)

The effect of the show cause order contained in the same decree was to render the adjudication of good faith a mere *prima facie* statement subject to be rebutted on the show cause order. This was done and the Judge dismissed the entire proceeding at its conclusion on a hearing *in response to the show cause order.* This appears at the beginning of the oral opinion of the District Judge delivered October 15, 1935, the District Judge expressly reciting:

> "Upon the filing of the petition by the debtor corporation to reorganize under Section 77-B, an order was entered approving it as properly filed, and that it was filed in good faith. However, the right was reserved to any person in interest to object to it upon any legal grounds, and parties in interest were directed to show cause why it was not filed in good faith."
> (R., 111.)

The debtor's appeal was from this order dismissing the proceeding in response to the show cause order. It is true that the District Judge was of the opinion that the debtor was acting in good faith in the sense of sincerity or honesty of purpose. It was proper for the Circuit Court of Appeals to review this holding of the District Judge if it involved an erroneous application of principles of law. The Circuit Court of Appeals held that the words "good faith" as used in the statute relate not to honesty of purpose or intent but to a reasonable expectation of successful reorganization, and concluded:

> "If we are right in this, there was erroneous application of the law in the finding of good faith, and the decree dismissing the petition should upon familiar principles governing appeals in equity be affirmed if right, however erroneous may be any given conclusion of law."
> (R., 157.)

It is believed that the sound reasoning of the Circuit Court of Appeals does not require further elaboration.

In several parts of the petitioner's argument it is stated in substance that the validity of the bonds issued by the debtor has been attacked in the equity receivership cause and that this issue is undetermined. For example:

"A petition is pending in the equity cause of *C. O. Carpenter, Receiver,* v. *Tennessee Publishing Company,* filed by unsecured creditors, attacking the validity of the bonds, and also questioning the amount due thereon, if held valid. This proceeding is undetermined."
Petition for *Certiorari,* p. 51b.

This statement is inadvertent and finds no support in the record. On the other hand, the District Judge, in his final opinion, referring to the equity receivership cause, said:

"In that case the validity and amount of the bonds outstanding was established. The debtor was a party to that suit; the question was submitted to the Standing Master and he made his report covering that question. The report, I am informed, is unexcepted to."
(R., 122.)

For the reasons which we have hereinbefore set out, it is believed that the assignments of error made by the petitioner are without merit and that the action of the District Judge and the Circuit Court of Appeals for the Sixth Circuit should be affirmed by this Court.

Respectfully submitted,

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Of Counsel

SUPREME COURT OF THE UNITED STATES.

No. 48.—October Term, 1936.

Tennessee Publishing Company, Petitioner, *vs.* American National Bank, C. O. Carpenter, Receiver, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[November 9, 1936.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Circuit Court of Appeals affirmed a decree of the District Court dismissing the petition of the debtor, Tennessee Publishing Company, and its plans of reorganization, in a proceeding under Section 77 B of the Bankruptcy Act. The court held (1) that the debtor's proposal was not a workable one and hence had not been presented in good faith as that phrase was used in the statute; and (2) that sub-section (b) (5) of Section 77 B, as applied to the adjustment of claims of non-assenting lienholders, was invalid under the due process clause of the Fifth Amendment.[1] 81 F. (2d) 463. We granted certiorari. — U. S. —.

At the beginning of the proceeding the District Judge approved the petition for reorganization as having been filed in good faith,

[1] The provision is as follows:

"(b) A plan of reorganization within the meaning of this section . . . (5) shall provide in respect of each class of creditors of which less than two thirds in amount shall accept such plan (unless the claims of such class of creditors will not be affected by the plan, or the plan makes provision for the payment of their claims in cash in full), provide adequate protection for the realization by them of the value of their interests, claims, or liens, if the property affected by such interests, claims, or liens is dealt with by the plan, either as provided in the plan (a) by the transfer or sale of such property subject to such interests, claims, or liens, or by the retention of such property by the debtor subject to such interests, claims, or liens, or (b) by a sale free of such interests, claims, or liens at not less than a fair upset price and the transfer of such interests, claims, or liens to the proceeds of such sale; or (c) by appraisal and payment either in cash of the value either of such interests, claims, or liens, or, at the objecting creditors' election, of the securities allotted to such interests, claims, or liens under the plan, if any shall be so allotted; or (d) by such method as will in the opinion of the judge, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection;"

but by an order to show cause reserved to all persons in interest the opportunity to present their objections. Answers and motions to dismiss were filed by bondholders. Three successive plans of reorganization were submitted and opposed. Several hearings were had. It appears that for more than two years prior to this proceeding, the affairs of the debtor had been in charge of a receiver appointed by the District Court upon a creditors' bill. An appraisal of the debtor's property showed assets worth about $295,000. Outstanding bonds, secured by mortgage, were in default and amounted with interest to approximately $900,000. There were unsecured claims of about $300,000.

We shall not attempt to state the many details of the various plans. It may be said in a general way that the first plan, and the second presented "as a supplement to, or alternate of," the first, contemplated an appraisal of the property, the determination of the value of the bonds, and the issue of new bonds and the distribution of the proceeds of their sale, after payment of costs, expenses and preferred claims, among the secured and unsecured creditors and stockholders. By an amendment the debtor offered to pay in cash the amount of the appraised value of the property as it might be judicially determined, or to pay the "actual cash value of all valid interests, claims or liens" as fixed by the court. The third plan looked to the retention of the property by the debtor subject to the lien of the bonds scaled to 80 per cent. of their face value or, in the absence of assent, to an amount found by the court to be due. Provision was also made for the issue of preferred stock.

In his final opinion, upon the third plan, the District Judge said that it would "manifestly be unjust to the bondholders" to undo what had been done in the equity case; that "the validity and amount of the bonds outstanding" had been established in that case upon the report of the standing master, to which the debtor had not excepted; and that it was admitted that the debtor was "notoriously insolvent".

The District Judge was unable to see how the bondholders could realize the value of their bonds, or how that value could be ascertained "except by a public sale" of the mortgaged property. He thought that the effect of the last plan was to disregard what had been done in the equity suit and to delay a final administration of the debtor's estate indefinitely. He found that none of the bondholders were willing to adopt the plan, and that more than two-

thirds of the bondholders and more than fifty per cent. of the unsecured creditors had affirmatively declined to accept it. He expressed the view that in such circumstances the adoption of the plan would deprive the secured creditors of their constitutional rights. While again ruling that the petition for reorganization was filed in "good faith", he saw no alternative "except to dismiss the petition and let the property be sold in the equity case".

The Circuit Court of Appeals considered that the District Judge in passing upon the issue of good faith was guided mainly by a consideration of the debtor's honesty of purpose. The court believed that more was required; that the statute had in view the submission of a practicable plan with a reasonable prospect for the rehabilitation of the debtor, and that hence in the finding of good faith by the District Judge there was an erroneous application of the law. Despite that, the court recognized that the decree of the District Court should still be affirmed if right, however erroneous might be any given conclusion of law.

Although reaching the conclusion that the plan of reorganization was not a workable one and failed to meet the statutory test, the Court of Appeals proceeded to consider the constitutionality of sub-section (b) (5) and held it invalid. This ruling was premature. The constitutional question was not necessarily presented as with such a plan no case had been made for the application of sub-section (b) (5). It is a familiar rule that the court will not anticipate the decision of a constitutional question upon a record which does not appropriately present it. *Liverpool, N. Y. & P. S. S. Co.* v. *Commissioners,* 113 U. S. 33, 39; *Cincinnati* v. *Vester,* 281 U. S. 439, 448, 449; *Arizona* v. *California,* 283 U. S. 423, 463, 464.

Nor do we need to inquire as to the precise limits of the concept of "good faith" as required by Section 77 B. Whatever these limits may be, the statute clearly contemplates the submission of a plan of reorganization which admits of being confirmed as *"fair and equitable"* and as *"feasible"*. However honest in its efforts the debtor may be, and however sincere its motives, the District Court is not bound to clog its docket with visionary or impracticable schemes for resuscitation. Sub-section (f) of Section 77 B provides for the confirmation of a plan only if the District Judge is satisfied "(1) that it is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible". These are prime conditions. Unless the District

Judge finds that the plan has these qualities he need go no further. Unless he so finds, he has no authority to proceed. There is no occasion for the District Judge to consider the constitutional validity of the application of the clauses of sub-section (b) (5) if the debtor's proposal is not found to be "fair" and "feasible". It was the duty of the District Judge in this instance to consider the debtor's proposal in that aspect. He did not find that proposal to be fair and feasible. On the contrary, he deemed it to be unjust to the bondholders to override what had been accomplished in the equity case. He found that it was impracticable to determine the value of their bonds except by a public sale and, in view of the financial condition of the debtor, he deemed a sale of its property to be "inevitable". And along with these considerations, the proposal encountered what he described as the almost unanimous opposition of the secured creditors and the refusal of assent by a majority of the general creditors. Where the debtor's plan of reorganization is not confirmed the District Judge is authorized to dismiss the proceeding. Sub-section (c) (8).

The question before the Circuit Court of Appeals was whether, upon the record, the District Court erred in refusing to confirm the plans and in dismissing the proceeding. The Court of Appeals examined the debtor's last proposal as its ultimate effort to repel attack upon the feasibility of reorganization. The court found that the plan was not understandable in all of its phases, even after diligent effort "to separate argument from concrete proposals" and "to reconcile apparently conflicting clauses". The provisions for a bond issue and for classes of preferred stock, out of the proceeds of which unsecured creditors and preferred stockholders were to be compensated, the court found to be "wholly incomprehensible". Certainly the District Court was not bound to consider such a plan as fair and feasible, or, in view of the situation which the record disclosed, to continue the proceeding.

That was an entirely adequate ground for sustaining the decree of the District Court without attempting to determine the constitutional validity of sub-section (b) (5). Quite apart from that question, upon which we express no opinion, the decree of the Circuit Court of Appeals, affirming that of the District Court, should in turn be affirmed.

Affirmed.